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23
REPORTS OF CASES

ARGUED AND ADJUDGED IN

THE SUPREME COURT

OF THE

DISTRICT OF COLUMBIA,

SITTING IN GENERAL TERM,

FROM JUNE 14, 1880, TO MAY 25, 1882.

REPORTED BY

FRANKLIN H. MACKEY.

WASHINGTON :

PRINTED BY JOHN L. GINCK,

1883.

Rec. May 18, 1883.

OFFICERS
OF THE
Supreme Court of the District of Columbia.

DAVID K. CARTTER - - - - -	CHIEF-JUSTICE.
ANDREW WYLIE - - - - -	} ASSOCIATE JUSTICES.
ARTHUR MAC ARTHUR - - - - -	
ALEXANDER B. HAGNER - - - - -	
WALTER S. COX - - - - -	
CHARLES P. JAMES - - - - -	.

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JAMES G. PAYNE - - - - -	AUDITOR.
CLAYTON McMICHAEL - - - - -	U. S. MARSHAL.
H. J. RAMSDELL - - - - -	REGISTER OF WILLS.

ERRATA.

The reader will please correct with his pen the following inadvertencies :

Page 29. Second line from bottom. Insert a full stop after the word "joinder," and remove the words "to maintain his suit," to the last line, inserting them between the words "and" and "gave."

Page 57. Line 6. After the word "was" insert "captioned."

Page 297. Transpose first line to foot of page.

Page 361. Insert date of decision, and names of judges sitting as follows :

{ Decided January 9. 1882
} The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

Page 445. Line 1. Strike out the word "new."

Page 458. Line 16. Insert the word "no" before the word "precedent."

Page 588. Line 19 from bottom. For "barred" read "based."

PREFACE.

For the sixty odd years prior to the organization of the Supreme Court of the District of Columbia, the only appeal from the judgments and decrees of the old Circuit Court was to the Supreme Court of the United States. From 1801 to 1816 all suits at law or in equity determined by the Circuit Court, and wherein the amount in controversy exceeded one hundred dollars, were thus appealable. In 1816 the amount was increased to one thousand dollars, with the proviso that, "where the matter in dispute shall be of the value of \$100, and of less value than \$1,000, on a petition to a justice of the Supreme Court, if the said justice shall be of opinion that errors in the proceedings of the court involve questions of law of such extensive interest and operation as to render the final judgment of the Supreme Court desirable, the case may be removed at the discretion of the justice."

The duty of reporting the decisions in these appealed cases devolved upon the reporters of the Supreme Court of the United States, and they are accordingly to be found scattered through such of the volumes of their reports as were published prior to the organization of this court. For more than half a century, therefore, these few cases in the United States Supreme Court Reports and such others in the Maryland reports as bore upon the construction of the statutes of that State in force here, were to the practitioners of this District the only authority whereto to refer upon matters of local law.

These seemed to have sufficed the wants of the bar of that day, for although from the organization of the court in 1801, notes of its decisions were faithfully kept in manuscript by Judge Cranch, the chief judge, which we are told

were in a manner accessible to the bar, yet their publication was not thought of until 1852, when they appeared in the five volumes known as Cranch's Circuit Court Reports, and became for the first time of any real utility. Valuable however, as these reports may have been in the absence of any others, still they were not, except in cases of appeal from the District Court and the Orphan's Court, the decisions of a court of review, and can scarcely be said to have been of more authority than a collection of *nisi prius* cases.

Eleven years after these reports appeared, the act of March 3, 1863, reorganized the judiciary of the District and modeled it to a large extent after the judicial system of the State of New York. Appeals from the trial court and from the chancellor are now taken to the General Term, from whose decision, if the amount in controversy exceed \$2,500, an appeal lies to the Supreme Court of the United States. Of the cases decided by the General Term, a large number involve most important points of law and equity, and incidental thereto, questions of practice and pleading peculiar to this court. The decisions in a large proportion of these cases are usually final. The opinions delivered have been almost invariably oral. Heard only by the few members of the bar who happened to be present at the moment of their delivery, they soon became a matter of tradition, and, like tradition, uncertain.

In this manner, for the past twenty years and more, has the Supreme Court of the District of Columbia, sitting in General Term, exercised a jurisdictional power more extensive in many respects than that of any court of the United States, except the Supreme Court. Questions the most important and involving the deepest research have been argued by counsel and considered by the court with a care and ability unsurpassed in any forum, and yet, except for the short period covered by the reports of Mr. Justice Mac Arthur, scarce a dozen of the many important opinions delivered during all these years have been preserved. It must strike one as somewhat remarkable that a court with a jurisdiction so varied and extensive and with a bar so large and in-

telligent, should have existed so long without any systematic plan for preserving in regularly published volumes of reports the many important cases decided by it. What a light would now be shining over these twenty years of darkness; what an amount of laborious inquiry would be avoided, had the opinions of the court settling these matters as they arose been taken down stenographically and the cases reported and published. Had this been done, we would possess to-day at least twenty volumes of reports instead of only three; and even these three would not be in existence save for the industry of one of the justices of the court in a labor which it is the duty of the bar to relieve the bench of. This ought never to have been so, much less ought it to continue. The law, as declared by the court, should be certain and it can only be certain when preserved in black and white. If the court has no means of turning to its prior decisions for guidance it is like a ship which sails without rudder or compass. It moves with doubt, with difficulty, with perplexity, and its labors as well as those of the bar are immeasurably increased. It was in the recognition of this fact that I saw, when a few years ago I came to practice at this bar, the opportunity to pay, as far as I could ever expect to pay it, an instalment of that debt which it is said every lawyer owes to his profession. The first volume of these reports is the result; but lest anyone may give the writer more than his due, let me say that but for the liberality of the publishers of the Washington Law Reporter in furnishing me at their expense with a shorthand writer, and also but for the encouragement and assistance afforded me in many ways by the justices of the court, especially in revising the stenographic notes of such of their opinions as were delivered orally, the preparation of these reports would have been an impossibility. I am also largely indebted for aid in various ways to many of my brethren of the bar. Many difficulties had at first to be overcome in obtaining the longer oral opinions which were sometimes upon most important questions of law. Failures in some instances could not at first be avoided, but I may safely

say that the second volume of these reports, the material for which I have now almost ready, will contain a report of every important case decided by the court during the period covered by that volume.

With one or two exceptions, which were unavoidable, the cases here reported are given in the order of their dates. Such of the opinions as were not delivered in writing are from carefully revised stenographic notes. Hence their accuracy may be relied on. In conclusion I wish to say that the work I have undertaken has no pecuniary reward, while the time which I am compelled to devote to it is often more than I can conveniently spare from other duties. The labor it involves I do not count, for it is one of love, and doubly so if, as I hope, it is appreciated.

FRANKLIN H. MACKEY.

WASHINGTON, *April* 16, 1883.

TABLE OF CASES.

	PAGE
Ager, Murray <i>v.</i>	87
Bank <i>v.</i> Hitz	111
Barbour, Strong <i>v.</i>	209
Barker Bros. <i>v.</i> Schooner E. M. Wright	24
Barnes, Brooke <i>v.</i>	5
Bennett, Wallingsford <i>v.</i>	303
Bicksler, United States <i>v.</i>	341
Bridget <i>v.</i> Cornish	29
Brooke <i>v.</i> Barnes	5
Building Association, Forsyth <i>v.</i>	205
Building Association <i>v.</i> Hilton	107
Burche <i>v.</i> Wallach	236
 Carpenter <i>v.</i> Starr	 417
Commissioners of the District, Thompson <i>v.</i>	463
Commissioner of Patents, Fisher <i>v.</i>	212
Connell <i>v.</i> Vanderwerken	242
Cornish, Bridget <i>v.</i>	29
 Daly, Poole & Hume <i>v.</i>	 460
Daniels, Ramsey <i>v.</i>	16
Davidson, Fox <i>v.</i>	102
District of Columbia <i>v.</i> Railroad	314
<i>v.</i> Johnson	51
<i>v.</i> Johnston	427
Railroad and Bridge Co. <i>v.</i>	217
<i>v.</i> Railroad	361
<i>v.</i> Strong	265

	PAGE
Dixon <i>v.</i> Railroad	78
Dodge, Knowles <i>v.</i>	66
Du Barry, Stevens <i>v.</i>	294
Ebbinghaus <i>v.</i> Killian	247
Ferry <i>v.</i> Langley	140
Fisher <i>v.</i> Commissioner of Patents	212
Forsyth <i>v.</i> Building Association	205
Fox <i>v.</i> Davidson	102
Garland, Harman <i>v.</i>	1
Garland, McDermott Bros. <i>v.</i>	496
Garland, Schneider <i>v.</i>	350
Gaslight Co., Lloyd <i>v.</i>	331
Gautier, Gibson <i>v.</i>	35
Gibson <i>v.</i> Gautier	35
Giddings, Merrick <i>v.</i>	394
Grice, Kendall <i>v.</i>	279
Guiteau, United States <i>v.</i>	498
Harmon <i>v.</i> Garland	1
Hayden <i>v.</i> Weser	457
Hilton, Building Association <i>v.</i>	107
Hitz, Bank <i>v.</i>	111
Hosmer, Insurance Co. <i>v.</i>	297
Insurance Co. <i>v.</i> Hosmer	297
Johnson <i>v.</i> District of Columbia	51
Johnston <i>v.</i> District of Columbia	427
Jones <i>v.</i> Warden	476
Jost <i>v.</i> Jost	487
Kendall <i>v.</i> Grice	279
Kenny, Smith <i>v.</i>	12
Killian, Ebbinghaus <i>v.</i>	247
Knowles <i>v.</i> Dodge	66
Langley, Ferry <i>v.</i>	140

	PAGE
Lemont <i>v.</i> Railroad Co.	180
Lewis <i>v.</i> Shepherd	46
Lloyd <i>v.</i> Gaslight Co.	331
Mackall <i>v.</i> Richards	444
Marble, U. S., ex rel. Sewing Machine Co. <i>v.</i>	284
May <i>v.</i> Shepherd	430
McDermott Bros. <i>v.</i> Garland	496
McManus <i>v.</i> Standish	147
Merrick <i>v.</i> Giddings	394
Morrison <i>v.</i> Shuster	190
Murray <i>v.</i> Ager	87
Neitzzy, Rick <i>v.</i>	21
Neverson, United States <i>v.</i>	152
Poole & Hume <i>v.</i> Daly	460
Patch <i>v.</i> White	468
Phillips <i>v.</i> Smoot	478
Railroad, District of Columbia <i>v.</i>	314
Dixon <i>v.</i>	78
Lemont <i>v.</i>	180
Railroad and Bridge Co. <i>v.</i> District of Columbia.	217
Ramsey <i>v.</i> Daniels	16
Richards, Mackall <i>v.</i>	444
Rick <i>v.</i> Neitzzy	21
Rodgers, United States <i>v.</i>	419
Schneider <i>v.</i> Garland	350
Schooner E. M. Wright, Barker Bros. <i>v.</i>	24
Shepherd, Lewis <i>v.</i>	46
May <i>v.</i>	430
Thompson <i>v.</i>	385
Shuster, Morrison <i>v.</i>	190
Smith <i>v.</i> Kenny	12
Smoot, Phillips <i>v.</i>	478
Standish, McManus <i>v.</i>	147
Starr, Carpenter <i>v.</i>	417

	PAGE
Stevens <i>v.</i> Du Barry	294
Strong <i>v.</i> Barbour	209
<i>v.</i> District of Columbia.	265
Thompson <i>v.</i> Shepherd	385
United States <i>v.</i> Bicksler	341
<i>ex rel.</i> Thompson, <i>v.</i> Com'rs of Dist. Col.	463
<i>ex rel.</i> Sewing Machine Co. <i>v.</i> Marble.	284
<i>v.</i> Guiteau	498
<i>v.</i> Neverson	152
<i>v.</i> Rodgers	419
Vanderwerken, Connell <i>v.</i>	242
Wallach <i>v.</i> Burche	236
Wallingsford <i>v.</i> Bennett	308
Washington & Geo. R. R., District of Columbia. <i>v.</i> .	361
Warden, Jones <i>v.</i>	476
Weser, Hayden <i>v.</i>	457
White, Patch <i>v.</i>	468

REPORTS OF CASES
DECIDED IN
THE SUPREME COURT
OF THE
DISTRICT OF COLUMBIA.

HARMON ET AL. vs. GARLAND.

AT LAW. No. 20,318.

{ Decided June 14, 1880.
{ Justices WYLIE, MAC ARTHUR and HAGNER sitting

- 1. Under the Married Woman's Act of 1869, R. S. D. C., a married woman owning a separate estate may contract to repair her house, or to have anything done to it that will put it into a condition to make it rentable.**
 - 2. Defendant, a married woman, owned a house as her separate estate. Plaintiffs sold and delivered furniture to her upon her promise to pay for same out of said estate. The defendant bought and used the furniture for the purpose of furnishing the house.**
- Held,** That this was a contract having relation to her separate estate.

MOTION in General Term for judgment on a special verdict.

The plaintiffs, furniture dealers, sued the defendant, a married woman, to recover the price of furniture used in furnishing a house forming part of her separate estate. At the trial, the jury rendered the following special verdict :

“ We, the jury, find that the furniture, the price of which is sued for in this action, was sold and delivered by the plaintiffs to the defendant, upon her representation that she was the owner of property in her own right, and that she would pay for said furniture out of her said separate estate. We further find that said furniture was bought and used by the defendant for furnishing a house forming a part of her separate estate, which house so furnished, said defendant

thereafter rented. We further find that said defendant, at the time of making said contract, was a married woman ; and being ignorant in point of law what our verdict should be upon the above facts, we find for the plaintiffs for the amount claimed, \$1,834.33, with interest from the first day of March, 1878, if the court shall be of opinion that upon said facts the plaintiffs are entitled to recover in point of law ; and if the court shall be of opinion that the plaintiffs are not entitled to recover upon said facts in point of law, then we find for the defendant."

J. J. DARLINGTON for plaintiff:

The " Married Woman's Acts " have been liberally construed in a majority of the States. This court having, however, in *Rich vs. Hyatt*, Wash. Law Rep., Vol. 7, No. 13, indicated its disposition to adhere to the " strict construction " school, the authorities cited will be confined to the decisions of the courts of those States, in which these statutes have been *most strictly construed*, viz.: *New Hampshire*: *Bailey vs. Pearson*, 29 N. H., 77 ; *Ames vs. Foster*, 42 N. H., 381 ; *Muzzey vs. Reardon*, 57 N. H., 378 ; *Illinois*: *Carpenter vs. Mitchell*, 50 Ill., 470 ; *Williams vs. Hugunin*, 69 Ill., 214 ; *New York*: *Yale vs. Dederer*, 18 N. Y., 265 ; S. C. 22 N. Y., 450.

The language of the New Hampshire act is as follows : " Married women, in the cases aforesaid, shall * * * be liable to be sued at law and in equity upon any contract by them made, or any wrong by them done, in respect to such property * * * in the same manner and with the same effect as if they were unmarried."

In the case of *Batchelder vs. Sargent*, 47 N. H., a case strikingly analogous to the present, the court said : " The power to hold property to the wife's sole and separate use, necessarily implies a power to hold whatever is essential to make that use beneficial ; such as farming tools, stock, and the like ; and as incident to holding such tools and stock, must be the right to purchase them, and pledge her credit for the price. * * * The wife has used her credit to

stock her farm, and she enjoys the benefit of it; and a decision which would discharge her from the obligation to pay for it, would not only be painfully unjust and productive of much mischief in that direction, but would, we are persuaded, be inconsistent with the policy of our legislation, which is to place the wife in respect to such property upon the footing of a *feme sole*."

This case is cited, first, because it is the decision of a court than which none has been a more strict constructionist of the class of legislation in question; secondly, because it is the decision of a court whose views in *Ames vs. Foster* were adopted and apparently most relied upon by this court in *Rich vs. Hyatt*; and, thirdly, because the case itself cannot be distinguished in principle, in a single particular, from the case at bar.

From the authorities of the States above mentioned, the following may be stated as contracts "in relation to the separate estates of married women" in the sense of the Married Woman's Acts, and which when made are binding upon them, viz.:

1. Contracts connected with and growing out of her property, or necessary to its use and enjoyment; as cattle to stock or labor to cultivate her farm. *Bailey vs. Pearson*, 29 N. H., 77; *Batchelder vs. Sargent*, 46 N. H., 262; See *Conway vs. Smith*, 13 Wis., 147; *Ames vs. Foster*, 3 Allen, 545; *Muzzey vs. Reardon*, 57 N. H., 378; *Carpenter vs. Mitchell*, 50 Ill., 470; *Cookson vs. Toole*, 59 Ill., 515; *Owen vs. Cawley*, 36 N. Y., 600.

2. Contracts for the benefit of the separate estate, or for the wife's benefit upon its credit; as for money to pay interest upon an encumbrance, or board for wife and her husband upon her promise to pay out of her separate estate. *Yale vs. Dederer*, 18 N. Y., 266; *Owen vs. Cawley*, 36 N. Y., 600; *Maxon vs. Scott*, 55 N. Y., 247; *Hammond vs. Corbett*, 5 N. H., 311; *Williams vs. Hugunnin*, 69 Ill., 214; *Manhattan B. & M. Co. vs. Thompson*, 58 N. Y., 80; *White vs. McNett*, 33 N. Y., 376.

3. Contracts made with intention to bind the separate

estate, or by both parties, upon its credit. *White vs. McNett*, 33 N. Y., 376; *Hammond vs. Corbett*, 51 N. H., 311; *Com. Ex. Ins. Co. vs. Babcock*, 48 N. Y., 613; *Carpenter vs. O'Dougherty*, 50 N. Y., 660; *Manhattan B. & M. Co. vs. Thompson*, 58 N. Y., 80; *McVey vs. Cantrell*, 70 N. Y., 295.

Rich vs. Hyatt decides nothing either for or against the plaintiffs in this action; its *reasoning* is conclusive in their favor. The doctrine of courts of equity upon this subject will be found in *Willard vs. Eastham*, 15 Gray, 828.

HAGNER & MADDOX argued the case for the defendant, but filed no brief.

Mr. Justice WYLIE delivered the opinion of the court.

Our married woman's act of 1869 declares that a married woman may contract as a *feme sole* in regard to any matter relating to her separate estate, and the question in this case is whether the purchase by a married woman of furniture for a house forming her separate estate is such a contract as relates to that estate. We think that it is. A woman who owns a farm, if she lives on it herself, may stock it. If she finds that she can rent it to better advantage by stocking it than by renting it without the stock, we think it is such an incident to the farm as would enable her to buy stock for that purpose. Under a similar statute in New Hampshire, just such a case has been cited by the plaintiff.

The house in question was in this city and was the property of the defendant, a married woman. It was of no use to the owner unless occupied or rented. Now a married woman may contract to repair her house or to do anything that will put it in a condition to make it rentable. We think it is a fair inference from the verdict in this case that the defendant, in order to rent the house to advantage, had to furnish it. Now to allow a woman owning property of this description to go to a furniture establishment or to a merchant and represent that she is the owner of a house and wants to furnish it so that she may rent it, and then permit her to come into court and say that she had no power to make such a purchase, would be allowing her to commit a fraud upon

the parties who trusted her, and would be a construction of the law that we ought not to give to it. Although the purchase of furniture may not strictly be said to be a contract relating to her separate estate, it would be a very narrow construction to allow the woman to defraud her creditors by keeping the furniture; for to turn the creditors over to the husband, who would probably set up the defense that he was not bound, would be to deprive them of a remedy anywhere.

We, therefore, direct that a judgment for the amount found to be due the plaintiff on the special verdict be entered.

MARGARET P. BROOKE vs. THEODORE BARNES ET AL.

IN EQUITY. No. 6513.

{ Decided June 14, 1880.
{ Justices WYLIE, HAGNER and JAMES sitting.

1. A husband can only act in respect of the wife's separate estate as her agent, and he can bind her only to the extent of the authority she gives him, or which she by her acts gives him the *appearance* of having.
2. The fact that a wife had previously given her husband authority to act for her in two or three transactions, is no ground for inference that she has therefore given him authority to do whatever is to be done in another transaction of an altogether different character.
3. When the husband undertakes to act as agent of the wife, he who deals with him as such must inquire into the extent of his authority. The mere assertion of the agent as to his powers, is not sufficient to bind the principal.
4. A husband being indebted to B, gave him in satisfaction thereof an order, signed by himself and wife, upon a fund belonging to the separate estate of the wife. The wife had signed and given the order to her husband for another purpose; but the husband represented to B that he had authority to use it in payment of this indebtedness. On a bill in equity filed by the wife, the court compelled B to refund the money.

STATEMENT OF THE CASE.

APPEAL from Decree in Special Term.

Clement H. Brooke, husband of the complainant, was the owner of a house and lot in Washington, D. C., upon which

there were two deeds of trust, the second being to secure a promissory note held by a Mrs. Stewart. The defendant, Theodore Barnes, also held a promissory note (unsecured) of Brooke, endorsed by Edward Brooke, brother of Clement. The Stewart note and the Barnes note were about equal in amount. The trustees of the Stewart trust were threatening foreclosure, and at the same time the Barnes note was about to mature. Under these circumstances Brooke, being without means of his own to meet his liabilities, proposed to Barnes that if he (Barnes) would take up and hold the note secured by the Stewart trust, he, Brooke, would give him an order signed by himself and wife upon their attorney, Mr. William J. Miller, to pay the Barnes note out of the proceeds of a judgment, held by Mrs. Brooke in her separate right as distributee of her brother's estate, and which had been placed in Miller's hands for collection. Barnes made inquiry, and having found that Brooke had on several previous occasions, with the consent of his wife, represented her in transactions with other parties respecting her separate estate, and that she had previously paid off one or two of her husband's debts, consented to the arrangement. Accordingly an order was given him signed by Brooke and wife, and accepted by their attorney, Mr. Miller. Barnes then took up the Stewart note and stopped the threatened sale. This was in May, 1877. In August, 1878, Brooke being insolvent, his property, subject to the two trusts above mentioned, was sold under a creditor's bill. The house having brought enough to pay off both trusts, Barnes demanded of the trustees payment of the Stewart note. Whereupon complainant filed this bill to enjoin Barnes from receiving same, except upon terms of refunding to her the money already paid him under the order signed by herself and husband, or giving credit for same upon the Stewart note, and turning the same over to her when paid. Complainant alleging that when she signed the order her husband represented to her that such was the understanding with Barnes.

The defendant Barnes, in his answer, set up that Brooke was agent for complainant, and that defendant dealt with

him as such, and if he deceived his principal it was without the knowledge of defendant, who dealing with him in good faith ought not now to be made to suffer ; that complainant, as principal, received all the benefit of the contract, and that the husband's statement, even if her allegations were true, were made to carry out her wishes, and she is bound by them. That at most it is a question between two equally innocent parties, and that equity in such a case would refuse to interfere, but leave the parties to their legal status.

Testimony was taken, and upon the hearing at Special Term the court dismissed the bill.

J. J. DARLINGTON and IRWIN B. LINTON for complainant :

1. To a contract there are four requisites : (a) An agreement (*aggregatio mentium*) ; (b) A consideration ; (c) Capable parties ; and (d) Some particular thing to be done. All four of these are wanting in the case at bar ; for—

(a) There never was any agreement. The complainant consented to one thing, the defendant to a wholly different thing. 1 Parsons Cont., 476 ; Green vs. Bateman, 1 Wood & M., 359.

(b) No consideration. The enjoyment of their home for the year intervening between the transaction in question and sale of the property under the creditor's bill was not a consideration. See Nat. Bank New Eng. vs. Smith, 43 Conn., 327.

(c) Incapacity of one of the parties. A contract that a married woman shall pay one of her husband's debts, on condition that the creditor shall purchase and extend another of the husband's debts, is not a "contract in a matter having relation to her sole and separate estate." On the other hand, the contract contemplated by the complainant was one strictly within her capacity to make. Rich vs. Hyatt, Wash. Law Rep., Vol. 7, No. 13. It was an investment of her separate estate in other property.

(d) The absence of the fourth requisite necessarily results from the absence of the first. The minds of the parties contemplated wholly different things as the subject-matter.

of the contract ; and consequently there was no "agreement to do or not to do a particular thing."

2. As complainant was not competent to make a contract, it follows that she could not make it by an agent. But was her husband her agent, either general or special? The theory of a "general agency" upon the part of the husband enabling him to bind the separate estate of the wife by his contracts, is inconceivable as a proposition of law. As to the alleged special agency of the husband for the wife in this transaction, it is clear that he was in no sense and in no particular the agent of the wife, in which he was not equally the agent of Barnes. See *Cent. Bank Frederickburg, vs. Copeland*, 18 Md., 305.

3. Complainant was not estopped to deny the contract as understood by Barnes. Parties not *sui generis* cannot effect by estoppel what they cannot effect by contract. *Lowell vs. Daniels*, 2 Gray, 161 ; 2 Smith's Lead. Cas., 753-5.

4. Barnes has not been damnified :

(a) He has lost nothing on the Stewart note, the property on which it was secured has been sold, and the fund is now in court amply sufficient to pay both principal and interest.

(b) He has lost nothing on the unsecured note which he already held, because that note was then uncollectable. The testimony shows both the maker and the endorser to have been insolvent.

HENRY WISE GARNETT for defendant :

1. If it be true that complainant was deceived, she has been benefited by the deceit ; the sale of her home was prevented. Where equities are equal the court will not interfere, but here defendant by his act benefited complainant ; he has, therefore, the stronger equity, and the court will not interfere, even if complainant and defendant were both deceived.

2. Complainant cannot ask a court of equity to set aside this order unless defendant can be put in as good a position as he was at the time the order was given ; at that time he could and would have gotten his debt from the endorser,

and probably something from the maker, both of whom are now hopelessly insolvent.

3. Clement H. Brooke was agent of his wife on this occasion. "Where one of two persons must suffer by the act of a third person, he who held that person out as worthy of trust and confidence, and having authority in that matter shall be bound by it." Story on Agency; §127, n. 2.

4. The representations of an agent are, in law, the representations of the principal; and where a married woman is at full liberty to appoint an agent she comes under the operation of this rule so as to be liable for damages by the fraudulent representations of the husband. *Vanneman vs. Powers*, 7 Lans., 185; Evans on Prin. and Agent, 465.

5. He was acting for her advantage as well as his own, the object being to prevent the sale of their home. Any false representations he may have made, were made to carry out their joint plans. The rule is that the principal is chargeable with agent's fraudulent representations when representations are in furtherance of the principal's plans. Wharton Prin. and Agent, §§164, 167, 171, and cases cited.

6. As between the principal and third parties, the true limit of the agent's authority to bind the former is the *apparent* authority with which the agent is invested, but as between the principal and agent the true limit is the express authority. Evans on Prin. and Agent, 452. The complainant allowing her husband to so conduct himself about her separate estate, and receive money, make contracts, etc., as to induce the general belief of his agency, she is bound thereby. "Where married women clothe another with *apparent* authority to act for and bind them, the *apparent* must be taken for the real authority, and they are estopped from disputing it, so far as others have been induced to act upon the faith of it. *Bodine vs. Killeen*, 53 N. Y., 93.

7. Complainant received the benefit of the transaction, as she retained her home for fifteen months by means of the action of her husband. "Principal is liable for agent's deceit of which principal takes advantage." Wharton on Prin. and Agent, §478.

Mr. Justice JAMES, after stating the case, delivered the opinion of the court :

The defendant Barnes takes the position that the complainant had authorized her husband to act as her agent. This proposition turns upon the question whether the husband had been held out by her as having that authority.

The principle is simple enough. Her husband could claim to act only as her agent, and he could bind her only in case he had actual authority to make the arrangement with Barnes or in case she gave to him the appearance of having that authority.

A good deal has been said in the books about the test of authority beyond that which was actually given. Sometimes, it is said, that it turns upon the question whether the person was a general agent. That is only one of the tests. The true test is this: Has the principal given the agent the appearance of having the authority? When a principal employs an agent as a general agent for the transaction of all business, he gives to him the appearance of having the power to do whatever it is proper to do in the business in hand. So if a principal employs an attorney at law in a special matter, although the attorney is not his general agent, he is held out as having that authority which an attorney is understood to possess in that particular matter. Again, if the principal employs a commercial factor, he holds him out as having such authority as a factor has by his calling. Or, if he employs what is called a livery-stable agent to sell a horse, he holds him out as having power to warrant the condition of the animal. But if he should employ a casual person, it is otherwise. That is simply because the character of the person holds out that he has the powers of that character. The question, then, is whether there is anything in the circumstances, or in the character of the agent which holds out the agent as having a certain amount of authority? If there is, the principal must stand by what the agent does.

It is said that the principal is liable for the frauds and

misrepresentations of the agent. That is where he actually employs the agent to do a certain thing. Then, if the agent commits a fraud in that which he is authorized to do, the principal is bound by it. But if the fraud consists in the agent's pretending to have the authority for that which he does, the principal is not affected.

Now, the only evidence given us of Mrs. Brooke having employed her husband as her agent with this amount of authority was, that she had authorized him to act in some of her matters before, chiefly, it would seem, to collect any moneys due her, and in one instance, perhaps in two, to apply it in payment of his debts. But she had not so employed him as to hold him out as having the position of her general agent to do for her whatsoever need be done in her matters. It was not to be inferred from one, two, or three transactions of a different character altogether, that she gave him power to do whatever was seen fit to be done in this matter. In fact, one of the arguments on these previous transactions seems really to present this case to us ; that because he had used up a good deal of her estate heretofore, therefore, she authorized him to keep on doing so. We are by no means inclined to make such a broad inference. She did not hold him out as having this authority. It was a special case of agency, the bounds of which are not to be judged of by Barnes by what had been done before ; or, if he were to so judge of them, he was bound to see that they indicated no authority to make this particular bargain. It was Mr. Barnes' duty to inquire into the extent of Brooke's authority ; and if he had gone to the principal—certainly he had no right to take the agent's assertion—he would have learned what the contract was.

The decree of the court, therefore, is that he surrender this order and return the money. This reverses the decree below, and the court under its power to modify the decree disposes of the case here.

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WILLIAM R. SMITH ET AL. vs. JOHN H. KENNEY ET AL.

IN EQUITY. No. 6953.

{ Decided December 20, 1880.

{ The CHIEF JUSTICE and Justice WYLIE sitting.

1. A duly recorded deed of trust upon merchandise contained a clause permitting the grantor "to retain possession of and use the said goods," &c.

Held, That if this language were to be interpreted as permitting the grantor to continue the business of selling and disposing of the goods, it would, as to creditors, be a serious objection to the validity of the deed; but construed with the clause giving the trustee the power to take immediate possession if the grantor were found removing them, it is to be taken as merely meaning that the grantor is to take care of and use the property subject to the rights of the trustee.

2. The same deed purported to secure a *bona fide* debt evidenced by four promissory notes; the last note represented no actual indebtedness on the part of the maker, but was given with the private understanding that if, in case of foreclosure, the property realized the face of the four notes, then the amount represented by this last note was to be repaid the maker.

Held, That this was a secret contrivance which rendered the deed void as to creditors.

3. Where a deed is void in part, as an evasion of the statute of frauds, it is void in the whole; it cannot be held good for a part and void as to the remainder.

STATEMENT OF THE CASE.

APPEAL from Decree in Special Term.

The defendant, Kenny, being indebted to Aitken, Son & Co., of New York, in the sum of \$797.80, for which they held his three promissory notes, agreed to secure them by a deed of trust, upon all the merchandise and other chattels in his store, being all the property of every kind that he possessed.

The deed, which was duly recorded, was an ordinary chattel trust, permitting the grantor "to retain possession of and use" the chattels mentioned until default made, and purported to be a conveyance to E. H. Munger, trustee, to secure a *bona fide* indebtedness to Aitken, Son & Co., said indebtedness being evidenced by the three notes above mentioned, and a fourth for \$400, of even date with the deed (July 24, 1879), and payable in four months after date. This last note represented no actual indebtedness on the part of Kenny to A., S. & Co., but was given with the private understanding that if, in case of sale under the trust, the

property realized the amount of the four notes, Kenny was to be repaid the \$400.

On the 2d of September, 1879, none of the notes having been paid, the trustee took possession of the store and contents. Two days afterward, the complainant having become a judgment creditor of Kenny's, levied on the property in the hands of the trustee as the property of Kenny, and then filed this bill to set aside the trust as fraudulent and void on the grounds alleged in the bill.

1. Because the deed upon its face reserves to the grantor the possession and the use of the goods and chattels pretended to be conveyed ; and—

2. Because the deed of trust recites a consideration which was and is fictitious, and thereby seeks or pretends to secure an indebtedness which in fact had no existence. The bill prayed an injunction and a receiver.

Further proceedings were had and on the final hearing at Special Term the court passed a decree setting aside the deed and declaring it null and void as to the creditors of Kenny.

From this decree an appeal was taken by defendants.

BARTRAM ZEVELY, for complainant, on the first point cited :

Twyne's Case, 1 Smith's L. C., 1 ; Edwards *vs.* Harben, 2 T. R., 587 ; Herm. Chat. Mortg., 200 ; Fry *vs.* Miller, 45 Penn., 441 ; Elliott *vs.* Robinson, 22 Wall., 513 ; Collins *vs.* Myers, 16 Ohio, 587 ; 2 Bond, 264 ; 43 Wis., 116 ; 28 N. Y., 860 ; 34 Mo., 432 ; 76 Ill., 479 ; and a large number of other authorities. And in support of the second point, North *vs.* Belden, 13 Conn., 376 ; Hart *vs.* Chalker, 14 Conn., 77 ; Russell *vs.* Winne, 37 N. Y., 591.

F. W. JONES and MILLER & LEWIS for defendants :

1. In this jurisdiction chattel trusts leaving the assignor in possession are not void if recorded within twenty days. The cases cited by complainant are from courts in jurisdictions where chattel trusts are not permitted. 1 Wash., 177 ; Bump on Fraudl. Conv., 191, and cases cited in note 2 ; 11 Gratt., 348 ; 3 Cranch., 73 ; 10 Leigh., 186-197 ; Wilson *vs.* Russell, 13 Md., 404 ; 2 B. & A., 498.

Possession of the goods had been delivered to Munger on September 2, 1879, before any judgment against Kenny and before the validity of the deed had been questioned. "If the goods are delivered to the mortgagee, before any creditor questions the validity of the mortgage, the transaction will be rendered valid." Bump on Fraudl. Conv., 166, and cases cited. The case of *Reed vs. Wilson*, 22 Ill., 377, is especially in point.

Mr. Justice WYLIE delivered the opinion of the court.

This is a controversy growing out of the claim of a judgment creditor to levy execution on certain goods alleged to be covered by a deed of trust. A judgment was obtained by the complainant against John H. Kenny, who had previously executed a chattel trust to one Munger to secure a debt which Kenny owed Aitken, Son & Co., of New York. The deed professes on its face to convey in trust the goods in Kenny's store for the purpose of securing certain notes held by Aitken, Son & Co. It is made a point that by the terms of the deed the goods were to be left in the store for the use of Kenny. The language of the deed on this subject is as follows:

"The same being now in and upon those premises, house or messuage, known as 915 Pennsylvania avenue, northwest, in the city of Washington, District of Columbia, to have and to hold the said goods and chattels and personal property, unto and to the use of the said party of the second part, his executors, administrators and assigns, in and upon the trusts and for the uses following: In trust to suffer and permit the said party of the first part to retain possession of and use the said goods and chattels and personal property, until the same shall and may be required, as hereinafter provided."

If this language were intended to permit Kenny, the grantor, to continue the business of selling and disposing of the goods as he had been doing heretofore, it would be a serious objection to the validity of the deed as to his creditors. But upon the whole it is not necessarily interpreted in that way, because the deed elsewhere provides that at any time thereafter the trustee may take immediate possession of the

said goods and chattels and personal property, wheresoever the same may be found. Now if the goods, or any part of them, were to be sold, then the trustee would have no power to take possession of the same goods and "to sell the same at public auction upon such terms, &c." We think that the word "use" was probably retained in the printed form of the deed, and that nothing was really intended by it, further than to allow the grantor to remain in the occupancy of the premises and take care of and use the property subject to the rights of the trustee, because the trustee had the power to follow the goods into anybody's hands. And it is further provided that in case Kenny should be found removing them, the trustee has power to take immediate possession. This provision would be unsustained with the interpretation of the word "use" in the way it has been interpreted by the complainant. But, as to the other point raised; it turns out that the sum mentioned in the deed as the indebtedness of Kenny to Aitken, Son & Co. was much larger than the sum which Kenny really owed. Kenny's indebtedness to Aitken, Son & Co. was only \$797—but a note was given on the same day with the deed of trust by Kenny to Aitken, Son & Co. for \$400. Now, Kenny did not owe them any such money; the giving of the note was brought about in this way: Kenny, in making the deed, gave a full conveyance of everything without any provision in regard to such of his property as was exempt and not liable to execution; Aitken, Son & Co., however, agreed that if Kenny would make a deed of trust to cover the whole property they would repay Kenny out of the proceeds of the trust, and it was in consideration of this promise that he gave the \$400 note.

Now, this was an arrangement calculated to deceive everybody. There was no such debt due by Kenny. The law was not intended to put it in the power of a failing debtor to get up an arrangement of this kind; to give a deed of trust and secure from the creditor \$400 out of the proceeds of the sale, to reimburse him for the relinquishment of his exemption. The whole transaction was a contrivance which the court cannot countenance. It is a secret contrivance calculated to

lead to abuses, and cannot be permitted to stand. Nor can we hold the deed good for a part and void as to the remainder. The rule is that if a deed be void in part as an evasion of the statute, it is void in the whole, for the statute is no nursing mother for fraud. This case, in our view, is a violation of the statute, which declares void all contrivances, deeds and schemes for the purpose of delaying and defeating creditors, and, therefore, we affirm the decision of the court below.

RAMSEY vs. DANIELS ET AL.

EQUITY. No. 4165.

{ Decided December 23, 1880.

{ The CHIEF JUSTICE and Justice WYLIE sitting.

1. Where the first of a series of three notes, payable in one, two and three years, and secured by deed of trust, had become overdue and was taken up, at the request of the maker, by a third party, who became the holder thereof, the payee delivering it uncanceled, the question whether such a transaction operated as a satisfaction and extinguishment of the note, so as to disentitle the holder thereof to any share in the fund, when, afterwards, through default in payment of the other two notes, the property is sold for a sum less than the incumbrance, is one depending upon the intention of the parties at the time of the transaction; if there was no intention to consider it as satisfied and extinguished, the holder will be entitled to share *pro rata* in the fund realized.
2. A case of this character stated in which the court held there was no extinguishment.

STATEMENT OF THE CASE.

APPEAL from a Decree in Special Term.

In May, 1873, the defendant, Joseph Daniels, executed a deed of trust, conveying certain real estate in the city of Washington in trust to secure the payment of three promissory notes, each for the sum of \$4,000, dated May 29, 1873, and payable to the order of John E. Carter, in one, two and three years, respectively, with interest.

In February, 1875, F. M. Ramsey, a judgment creditor of Daniels, filed this bill in equity for the purpose of subjecting to the lien of his judgment the equitable interest of Daniels in the above property.

A decree for sale was made and the property was sold, but realized less than enough to satisfy two of the notes. The cause was referred to an auditor to report priorities and the proper distribution of the fund. The following facts were established before the auditor :

Upon the maturity of the first note, Daniels, being unable to pay it, applied to Seth E. Terry, a broker, for assistance. A contract was accordingly made between Daniels and Terry, whereby the latter was to take up the note and hold it until certain claims, which Daniels was prosecuting against the United States, could be collected, provided that if said claims should not be paid within three years, then Terry was to enforce the payment of the note by a sale of the property under the Carter deed of trust. These claims were never collected.

In pursuance of this agreement Terry proceeded to take up the note, but, not having enough money himself, he applied to one C. C. Burr and made an arrangement with him, under which Terry was to pay one thousand dollars and the accrued interest on the note, in all about \$1,400, and Burr to furnish the remaining \$3,000. The latter to receive the note and hold it as security for the amount advanced by him.

Terry, who had previous interviews on the subject with Carter, then went to Carter's place of business, paid him the accrued interest and one thousand dollars, and told him that the three thousand dollars still due would be paid through the Second National Bank. At the time of the payment by Terry to Carter, though the latter had the note with him, he made no endorsement upon it of the amount paid by Terry. Subsequently Carter called at the Second National Bank and received the three thousand dollars, which amount had been paid by Burr, to whom the note was delivered endorsed in blank, uncanceled, and, except an endorsement, "Interest on the within paid to September 29, 1874," without any mark or writing to indicate that there had been any payment upon it.

After the note had been transferred to Burr in the manner indicated, Daniels, who had furnished none of the money, nor been present when it was paid, was given, by Carter, a written acknowledgment that the note had been paid by him, Daniels. Of this paper neither Burr nor Terry had notice. In January, 1876, Burr died, and Martha Jane Burr was appointed and qualified as administratrix. In February, 1876, Nathaniel Carusi purchased from Carter, before maturity, the third note of the series. Subsequently, Carter assigned to Dorsey E. W. Carter the second note, which was then overdue.

Burr's administratrix, though not made a party to the bill of complaint, appeared in the case before the auditor, claiming the right to participate *pro rata* with the holders of the other notes in the distribution of the fund.

The auditor reported that the notes held by Dorsey E. W. Carter and by Carusi were liens upon the fund, and that Carusi was entitled to priority. He rejected the claim of Burr's administratrix on the ground that the note held by her had been paid and extinguished. Burr's administratrix and Dorsey E. W. Carter excepted to the report. At the hearing at Special Term exceptions of both were overruled. Thereupon the case was appealed to the General Term.

PERRY and WILSON for Burr's administratrix:

1. The note held by Burr's administratrix has not been paid or extinguished. Nothing whatever has been paid on account of it by the maker. The money paid to Carter by Terry and Burr was paid with the intention and for the purpose of taking up the note and holding it as a security, and the delivery of it to Burr amounted to an assignment, and this without regard to any unexpected intention or understanding of Carter at the time he received the money. The intention which controls is the intention of the parties paying the money. *Dodge vs. F. S. & T. Co.*, 93 U. S., 379.

2. The security given by the maker of the note is an incident of the debt, and follows it into the hands of all *bona fide* holders.

3. The proper rule of distribution among the holders of different notes secured by the same deed of trust, where the fund is insufficient to pay all, is payment *pari passu*. *Ocean National Bank vs. Brown*, 4 Wash. Law Rep., No. 31.

4. A note does not cease to be negotiable when it becomes due. The only difference between such a note and one not due, is, that in the former case, an indorsee can acquire no better title against the maker than his indorser had. *Byles on Bills*, pp. 128, 130.

5. Burr's administratrix claims to stand exactly where Carter stood when he parted with the note. It is not pretended that Daniels could have made any defense, and she is, therefore, in no worse position than an indorsee before maturity.

H. O. & R. CLAUGHTON for Dorsey E. W. Carter, *contra*:

The court below held that as to Carter there had been a payment of the note and a cancellation of the security, but as to Daniels the note was an existing liability, having been, with the consent of Daniels, after the payment of it to Carter, pledged to Burr.

It is not deemed necessary to argue or cite authorities to show that the court was correct in that ruling.

WALTER D. DAVIDGE for Carusi.

Mr. Chief Justice CARTER delivered the opinion of the court.

The great difficulty here is over the rights of the parties with reference to note No. 1. It is claimed by Burr's administratrix that she is entitled to a satisfaction of the note out of the fund. On the other hand, it is contended by Carter that the note is satisfied and extinguished. And the issue here is whether it is a satisfied cancelled instrument, or one remaining to perform the office of commercial paper. Was it paid? The maker of the note never paid it. He could not pay it. He had been requested by Carter to do so and he told Carter he could not. Carter, however, was paid and he was paid out of Burr's and Terry's money. Now, was this a payment in satisfaction of the note? Our judgment

in this matter is ruled largely by the case in 93 U. S., which contemplates the disposition of a piece of paper of this kind according to the intention of the parties. It either survives with their intention or it dies with their intention. If a note is paid with reference to its satisfaction and extinction in the purpose of the parties, the law gives it that effect, and the assent of the maker of the note as well as that of the payee is necessary.

Now, Daniels never contemplated paying this note at that time, for he had entered into a stipulation with Terry to continue its existence. Terry also says that he did not contemplate it; that the note was passed to his possession under an arrangement, between him and Daniels, to carry it to a postponed period, and to make use of it with its underlying security to enable him to negotiate a loan upon it as he did; and in this way it was transferred to Burr.

Mr. Carter says he understood it otherwise; that it was in satisfaction of the note that the payment was received. Now, we think, the weight of the testimony is decidedly the other way. We think that the delinquency of Daniels; the knowledge of that fact by Carter; the past due condition of the note; the history of the paper itself in the mode of negotiating this loan; all indicate anything but a transaction for the payment and destruction of the note. We think that it remained as a living piece of paper for commercial purposes; to negotiate just such a loan as was made upon it, and that this was with the implied consent of Mr. Carter. We do not think, therefore, that he ought to be permitted to assert as against it any exclusive control of the fund. He has received the money on this note. That money was advanced on the faith of the security underlying it and that it carried with it, and we fail to see why he should be preferred to a party who has thus advanced money upon it. The conclusion we have come to is that this fund should go to the payment of these notes *pro rata*.

ALORIS RICK vs. GEORGE NEITZY.

IN EQUITY. No. 5215.

{ Decided January 12, 1881.

{ The CHIEF JUSTICE and Justice WYLIE sitting.

1. A positive denial in the answer can only be overcome by the testimony of two witnesses, or of one witness and corroborating circumstances.
2. When the only witness for the complainant is himself, his testimony in order to meet the positive and absolute denial of the defendant, should be vigorous, strong and clear.
3. Where there is a dispute in regard to partnership matters, and the parties have been so negligent as to lose the evidence of the partnership, and have kept their accounts in so confused a way that the court cannot see what decree would do justice between them, the bill will be dismissed.

STATEMENT OF THE CASE.

APPEAL from a Decree in Special Term.

In 1871 the defendant, George Neitzzy, was awarded certain contracts by the Board of Public Works, comprehending the improvement of the roadways of Twelfth street west, from Pennsylvania avenue to the Potomac river, and D street north between Thirteenth and Fourteenth streets west. The complainant, Aloris Rick, having control of a granite quarry near the city of Richmond, Virginia, which would enable him to furnish the granite blocks required for said improvement, entered into a verbal contract of co-partnership with the defendant to do said work for the joint benefit of both; the profits to be divided equally between them, regardless of the amount of capital invested by either party.

In pursuance of this contract they commenced to work the quarry and obtained therefrom a large amount of granite blocks, which were used in the paving work under the contract with the Board of Public Works. In September, 1875, the defendant had a final settlement with the District of Columbia.

The complainant in his bill alleged that the defendant had never had any settlement with him, and prayed for an account.

The defendant in his answer admitted the contract with Board of Public Works, and the verbal contract with the

complainant, but denied that the complainant had any interest in any part of the work done by defendant on that portion of Twelfth street from Ohio avenue to B street north, or that the contract between complainant and defendant extended thereto. The answer also denied any indebtedness on the part of defendant to complainant.

By consent of counsel the cause was referred to a special auditor, with directions to state an account between the parties. The auditor found and reported the defendant indebted to the complainant in the sum of \$5,003.23, with interest from January 1, 1873.

To this report the defendant excepted, and on the hearing at the special term the exceptions were overruled and a decree passed, "that the plaintiff do recover from the defendant the sum of \$5,003 less the sum of \$250, with interest from the 1st of January, 1873, besides costs."

HINE & THOMAS for complainant.

WALTER D. DAVIDGE and FRANK T. BROWNING for defendant.

Mr. Justice WYLIE delivered the opinion of the court.

The controversy in this suit is confined to the work done on that part of Twelfth street which lies between the north line of Ohio avenue and B street north. Rick says he was a partner in this portion of the work. This is absolutely denied by Neitzzy under oath, and when Rick himself comes to testify it would seem that he does not come up to the mark. Although he does technically and apparently say that he was interested, yet his declaration is not vigorous and strong and clear, as testimony ought to be on that subject, in order to meet the answer of the defendant, who utterly denies that his contract with the complainant extended to this portion of the square; that on the contrary, the work was performed by himself in partnership with Nicholas Acker.

The record shows that Acker and Neitzzy had a contract to pave portions of Ohio avenue and of Louisiana avenue.

We do not think that the deposition of Rick in this case is strong enough to meet the positive and clear denial by Neitzzy of the partnership. And then, when we come to look at the other evidence in the case, the evidence of Campbell, who was the bookkeeper for Neitzzy and Acker, and who kept an account of the work at that point, it is unimpeached. Campbell was in a situation to know more about the work than any living man, except the parties themselves, and he testifies that the work was done by Neitzzy and Acker and not by Neitzzy and Rick.

Mr. Chief Justice CARTER : And he was reinforced by the superintendent.

Mr. Justice WYLIE : And another.

Mr. Chief Justice CARTER : Yes, two others.

A positive denial in the answer as strong and clear as Neitzzy's is in this case, can only be overcome by the testimony of two witnesses, or of one witness corroborated by circumstances. The only witness in this case for the complainant is himself; that is not the kind of a witness that the law requires to overcome a positive denial on the part of the defendant. And the strong preponderance of evidence is that the work was not done by Rick and Neitzzy at all but by Neitzzy and Acker.

Then there is another view of this matter. The contract was in the name of Neitzzy; there were no written articles of agreement between Rick and Neitzzy; there were no books of account kept which would throw light upon the subject; nothing in the world to prove the partnership except the unsustained oath of Rick. The Supreme Court held a few years ago, in a case that went up from this court, affirming our decision, that where there was a dispute in regard to partnership matters, and either party or both parties had been so negligent as to lose the evidence of the partnership, and to keep their accounts in so confused a way that the court cannot see what decree would do justice between the parties, the court will be unable to make a decree at all. We dismissed the bill in that case, for the simple reason

24 BARKER BROS. v. THE SCHOONER E. M. WRIGHT.

that the evidence of partnership, and the evidence in regard to the account between the parties, was in so confused a state that we could not reach a conclusion that would be satisfactory to ourselves. An appeal was taken to the Supreme Court, and they affirmed our decision upon the same ground; that a party who sues to establish a contract and makes a claim under the contract, must make it in such a shape that the court may know what decree will do justice between the parties.

This is too confused and difficult a case to get at and to make clear. The result must be that the decree below must be reversed and the bill dismissed.

BARKER BROS. vs. THE SCHOONER E. M. WRIGHT.

IN ADMIRALTY, No. 301.

{ Decided January 31, 1881.
Justices WYLIE, HAGNER and Cox sitting, with whom,
at the rehearing, was Justice MAC ARTHUR.

1. Payment of freight cannot be exacted of the consignee until there has been such a discharge of the cargo as to enable him to ascertain whether the goods correspond with those ordered.
2. This rule will not be modified because the cargo consists of ice, and consequently liable to diminish by melting when exposed upon the wharf to the heat of the sun.
3. There is nothing in the delivery of the goods upon the wharf before payment of freight at all inconsistent with the retention by the master of his lien for the freight.
4. The master has a right to demand payment of the freight before the goods are taken from the wharf if such removal interfere with the reasonable enforcement of his lien, and, if the cargo be too large to be landed in one day, he may require a *pro rata* payment as regards value before the portion first landed can be taken away.
5. As a consignee is under no obligation to receive or pay for goods differing in character from those which he contracted to buy, there can be no duty devolving upon him to pay freight for the carriage of such goods.
6. A consignee of a cargo of ice cannot refuse to pay freight for the entire cargo as originally shipped, because part of it has been diminished by melting. For any unusual loss or diminution he might have a remedy against the underwriter; but since the cargo is, at the risk of the consignee from the time of its shipment and the mailing of the bill of lading, he is liable to pay the freight on the entire amount shipped; his right to inspect the goods is for the purpose of ascertaining whether they are of the *character* and *description* ordered.
7. The consignees of a cargo of ice, which arrived in Washington, D. C., in the middle of July, wishing to inspect the cargo before paying the freight, proposed to the master of the vessel that if he would proceed with the delivery of the goods, they would pay the freight *pari passu*;

or, if he preferred it, that the cargo on being landed should be stored in a convenient ice warehouse, belonging to the consignees, on the wharf. The master refused to do either, but demanded payment of the freight in full before the cargo was discharged. This the consignees refused, and in consequence of the disagreement the ice melted away in the hold of the vessel.

Held, That neither of the propositions submitted to the master would, if accepted, have imperiled his lien for freight, and he was liable to the consignees for so much of the cargo as was lost.

8. *Semble*, That a provision in a charter party, that the cargo shall be discharged by the consignee with the assistance of the crew, so far from giving a stricter right to the master to demand prepayment of the freight may have rather the contrary effect.

APPEAL from a decree of the District Court.

THE CASE is stated in the opinion.

NATHANIEL WILSON for libellants.

T. A. LAMBERT and R. T. MERRICK *contra*.

Mr. Justice HAGNER delivered the opinion of the court.

Barker Brothers, dealers in ice, in Georgetown, ordered from the Water Cove Ice Company of Bath, Maine, a cargo of ice which was shipped in July, 1879, consigned to them at Georgetown on the schooner E. M. Wright.

The vessel arrived about the 15th of the month and the captain, on his arrival, reported to the consignees. By them he was directed to lay his vessel alongside their wharf and unload his cargo. He informed the consignees that he declined to discharge the cargo until he had received his freight in full. The consignees objected to paying the freight in advance of the discharge of the goods, insisting that it was not payable until they had had an opportunity of inspecting the cargo after it was landed. The captain adhered to his refusal, and two propositions were then made by the consignees: First, that if he would proceed with the delivery they would pay the freight as the cargo was delivered, *pari passu*. The other proposition was that he should land the cargo; that it should be stored in an ice warehouse belonging to the consignees on the wharf, after which the consignees would pay the freight. Both these proposals were refused by the master. The vessel remained for some time in the neighborhood of the wharf, the cargo diminishing in consequence of the intense heat of the weather and

finally the captain dropped out into the stream, filed a libel against the cargo for his freight, and the ice was sold by an order of court, realizing an amount insufficient to discharge the full amount of the freight. The consignees, thereupon, filed a libel against the vessel, its tackle, apparel, &c., to recover the value of the cargo of ice, estimated at \$1,500, which they alleged had been wholly lost to them, in consequence of the refusal of the captain to deliver it. The case was heard before the judge of the District Court and the libel dismissed, and it now comes before this court upon an appeal from that decree.

The propriety of the decision below depends upon the question whether the captain had the right to insist upon the payment of his freight before the discharge of the goods. It was contended upon the part of the captain that whatever the general rule on the subject might be there were two circumstances in the particular case which would qualify its application :

First. It was said that the exceptional character of the cargo, owing to its perishable nature, gave to the captain the right to refuse to land the cargo, under the heat of the July sun, until he should receive his wages for the transportation of the unmelted cargo. It seems to us that the general rule on the subject cannot be modified to meet the peculiarities of the cargoes which may be shipped on board vessels. There doubtless are cargoes less perishable than ice, but there are others which are infinitely more so ; and we find no warrant for the idea that the well-settled rule of law on the subject can be changed and shifted to meet such exigencies in a particular case.

Second. It is said that the provision in the bill of lading that the cargo shall be discharged by the consignee with the assistance of the crew, is exceptional in its nature, and that its effect should be to give a stricter right to the master to demand prepayment of freight.

We have found no warrant for this conclusion.

If this were an exceptional provision in the charter party, it would seem to us that the effect might be considered as

rather limiting than increasing the rights of the master in regard to the prepayment of his freights.

In point of fact the provision in question is not exceptional, but appears to be generally, if not universally, inserted in bills of lading of ice; and frequently where the cargo is the reverse of perishable; and nowhere has such effect been given to it by the courts.

The case, therefore, is to be decided according to the general rule governing such cases, and this we consider is well settled in the case of the *Eddy*, reported in 5 Wallace, 482. It is there laid down that "in the absence of an agreement to the contrary, the ship owner has a lien upon the cargo for the freight, and may retain the goods after the arrival of the ship at the port of destination, until the payment. But the master, however, *cannot detain the goods on board the vessel. He must deliver them.* An actual discharge of the goods at the warehouse of the consignees is not required to constitute delivery. It is enough that the master discharge the goods upon the wharf giving due and reasonable notice to the consignee of the fact." *The Mary Washington*, Chase's Decisions, 125; *Logs of Mahogany*, 2 Sumner, 601.

"The freight cannot be demanded unless the goods are delivered or tendered, or delivery is prevented by the act or fault of the shipper or consignee." 2 Pars. Cont., 295.

There is nothing in the delivery of the goods upon the wharf, before payment of the freight, at all inconsistent with the retention by the master of his lien for his freight. It is settled by all the authorities that the payment of freight cannot be exacted until there has been such discharge of the cargo as to enable the consignee to inspect the goods, to see and ascertain whether they really correspond with those ordered by him. *Vitrified Pipes*, 14 Blatch., 274. As he is under no obligation to receive or pay for goods differing in character from those which he contracted to buy, there can be no duty devolving upon him to pay freight for the carriage of goods not corresponding with his order. We do not suppose that the consignees in this case, upon the landing of the

ice, could have refused to pay freight for the entire cargo as shipped, because part of it had been destroyed by melting. For any unusual loss or diminution, the consignee might have a remedy against the underwriter. But since the cargo must be considered as at the risk of the consignees, from the time of its shipment and the mailing of the bill of lading to them, the obligation to pay freight for the entire amount shipped might be enforced against the consignees. The inspection spoken of would be for the purpose of ascertaining that the goods were of the character and description ordered.

We see nothing in the case of *Britton vs. Barnaby*, 21 Howard, 527, which is in opposition to the rule announced in the case of the *Eddy*. It is there declared to be the general rule that delivery of goods at the place of destination, or readiness to deliver, is a precedent condition to the right to demand payment of freight. In the case at bar, the captain absolutely refused to commence the delivery until the freight had been paid in full. It is certainly true that the captain had the right to demand payment before the cargo was taken away from the wharf in such a way as to interfere with the reasonable enforcement of his lien. And in the case of *Britton vs. Barnaby*, the Supreme Court say, "if the shipment is large, so that it cannot be landed in one day, the master may require a *pro rata* payment as regards value, before the parcels first landed can be taken away." But neither of the propositions submitted to the master by the consignees would have resulted in any imperiling of his lien for freight. The *pro rata* plan suggested by the consignees, would have secured the captain the payment of his freight *pari passu* with its delivery; and the second offer, to store the ice in a convenient warehouse on the wharf, could not have operated to embarrass the enforcement by the captain of his lien. *Sears vs. Wills*, 4 Allen, 212; *The Kimball*, 3 Wall., 37; *The Eddy*, 5 Wall., 481; *The Bird of Paradise*, 5 Wall., 545.

Under the circumstances disclosed in the record, we are of opinion that the libel below should have been sustained, the consignees, in our opinion, having a just claim against

the vessel for the loss of so much of the cargo as resulted from the wrongful act of the captain. The case is therefore remanded that proper proceedings may be taken to ascertain the amount for which a decree should be entered.

NOTE.—A rehearing of this case was subsequently allowed, at which, in addition to the justices above named, was Justice Mac Arthur; and Mr. Justice Wylie announced the opinion of the court, sustaining its ruling as above.

JOHN F. BRIDGET vs. GEORGE G. CORNISH.

AT LAW. No. 15,557.

{ Decided February 7, 1881.

{ The CHIEF JUSTICE and Justices WYLIE and MAC ARTHUR sitting.

1. A mere bailee for hire, though in possession, cannot give title to a third person.
 2. Where there is a lease of personal property and delivery of possession to the lessee, if there are no other considerations entering into the transfer, the lease confers no such right as will protect a *bona fide* purchase from the lessee.
 3. But where the *title* has been *qualifiedly* passed with the possession and the lien of the vendor is not reserved according to the condition of the statute requiring a written instrument of encumbrance duly recorded, the vendor parts with the possession at his peril, and if an equity in the property by purchase, concurring with the possession, is found in one who sells in open market to a *bona fide* purchaser, such sale carries title.
 4. M. obtained possession of a buggy and harness by virtue of the following paper: "This is to certify that I have hired of J. F. Bridget a buggy and harness for the term of three months from date, for the sum of \$25 per month, together with a cash payment of \$50, making in all \$125. The said John F. Bridget agreeing at the end of the time above mentioned to give me the privilege of purchasing the above named buggy and harness by paying an additional sum of \$125."
- Held*, that the equity of the property passed with the possession to M. and that a subsequent *bona fide* purchaser in open market for full value obtained title.
6. Whether a demand is necessary in the case of a mere detention under claim of right before replevin can be maintained, *quære*.

STATEMENT OF THE CASE.

MOTION for a new trial upon exceptions.

This was an action of replevin "for unjustly detaining one doctor's phaeton and one set of harness." Plea "not guilty," and joinder to maintain his suit. Plaintiff claimed as owner of the property and gave in evidence the following paper:

“ WASHINGTON, D. C., *September 22, 1875.*

“ This is to certify that I have hired of J. F. Bridget, a buggy and harness for the term of three months from date, for the sum of \$25 per month, together with a cash payment, in advance, of \$50, making in all \$125. The said John F. Bridget agreeing, at the end of the time above mentioned, to give me the privilege of purchasing the above-named buggy and harness by paying an additional sum of \$125.

“ W. W. MYERS, M. D.,

“ 1619 K street.”

After giving evidence of the value of the property and the delivery of the same to Myers under the above agreement, the plaintiff rested his case.

The defendant then gave evidence tending to prove that he bought the property in question of Myers, and paid him therefor in cash the sum of \$250. That at the time of said purchase Myers was in possession of the property claiming as owner. That the defendant at the time of purchase had no knowledge that Bridget, or any other person than Myers, owned, or claimed to own, the property, and that no demand was ever made of him by plaintiff, or any one in his behalf, for the property in question before the bringing of this suit, or afterwards.

Counsel for defendant then asked the court to instruct the jury “that if they believed from the testimony that the defendant purchased the property in question of W. W. Myers, who had possession of the same at the time, in good faith, for a full consideration, without notice that the plaintiff had any claim thereon, and that no demand was made by the plaintiff, or in his behalf, of the defendant, before the commencement of this suit, they should find a verdict for the defendant.”

The court (Justice Cox sitting) refused so to charge, but instructed the jury “that the title to the property in question, under the paper writing offered in evidence, dated September 22, 1875, remained in the plaintiff, and that no demand was necessary, previous to the bringing of the suit, in order to

entitle the plaintiff to recover." To which instruction the plaintiff excepted. The jury thereupon rendered a verdict for plaintiff.

SELDEN and ENNIS argued the case for plaintiff, but presented no brief.

P. B. STILSON, for defendant, filed a brief from which we extract.

1. The contract was dual in *form* and *fact*. The delivery was made by plaintiff as well upon the contract of *sale* as hiring. Plaintiff accepted fifty dollars and delivered the property without reserving the title or providing for its return to him. This, then, is an ordinary case of sale and delivery upon part payment of the purchase-money. The contract being unrecorded, and the defendant having no notice, actual or constructive, of any claim or lien by plaintiff, or any one else, had a right to treat Myers as the owner. When one delivers property to another in such manner and under such circumstances as will lead a stranger to believe that the possessor is the owner, he is estopped to claim title to the prejudice of the innocent purchaser. Where one of two innocent persons must suffer, it is well settled that he who aids in the fraudulent sale by furnishing the means of its perpetration must bear the loss. Chitty on Contracts, 763; 2 Md. Ch. Dec., 281; 5 O. S. R., 256; 2 T. R., 70.

2. The action of replevin, like trover, is tortious, implying wrong on the part of the defendant. The wrong implied may be in the *taking* or in the *detaining*. In the first, the right of action is complete and suit lies at once; but where the defendant comes honestly and fairly into possession of the property as by delivery to him, without any badge of fraud or circumstances to put him on inquiry, the law will not impute wrong to him either in act or intent, and neither trover or replevin will lie, until after a demand of him by the owner, the wrong only attaches to him by a refusal to deliver, after such demand. 20 Wend., 234; 3 Hill, 348; 24 Pick., 211; 13 Ill., 315; 17 Ind., 90; 6 Johnson, 44.

Mr. Chief Justice CARTER delivered the opinion of the court:

Two very interesting questions are raised incident to the determination of the rights of these parties. One is whether before the plaintiff can place himself in a position for giving effect to the remedy he has sought, he must show a previous demand for the property to have been made of the defendants. The other is whether the plaintiff had parted with his property in such wise as to make it impossible for him to maintain the action of replevin as against a *bona fide* purchaser. Inasmuch, however, as the conclusion of the court, predicated upon the character of the transaction, makes it impossible, as we think; for the plaintiff to recover, the question as to his having complied with the technical rules of the law, in respect to making demand of the property before bringing suit, is postponed, although a very interesting question, until there is such a case before us as requires the settlement of it.

Bridget entered into a contract with a man by the name of Myers, in the following language:

[Here reading the agreement above stated.]

Now, upon the predicate of that undertaking and that act, Bridget brings his action of replevin against Cornish, who is the purchaser of this property from Myers for a valuable consideration, and without any notice of the rights of Bridget in the premises. He not only bought it for a *bona fide* and ample consideration, but paid it and took possession of the property; and the question here is whether, as between Cornish and Bridget, Bridget has the right to demand from Cornish and recover of him the property. The determination of this question must depend upon the character of this transaction. There is no controversy over the question that a mere bailee for hire, although put in possession of property does not acquire title to it in such wise as to confer it upon a third person. Men may lease their personal property and deliver its possession and custody to the lessee, and if there are no other considerations entering into

the transfer, the lease confers no absolute title and the buyer purchases at the peril of his own inquiry.

If this were a transaction of that character the court would follow it with that conclusion, but we do not understand it as such. To us it appears that this was an undertaking for sale without a reservation, or at least one where the law might protect the lien for the unpaid portion of the purchase money. The language of the instrument would indicate it simply as a change of possession for hire, if it was not qualified by payment of part of the consideration of purchase or the right to purchase. Here is the payment of fifty dollars mentioned in this instrument, not to say anything of the exaggerated rental reserved in the paper, all of which looked to the same result—the purchase of the property. Instead of being recited as a conditional purchase it is recited as of hire, and is declared to be a privileged purchase. Now, we think the verbiage of this paper does not change or qualify the real or substantial character of the transaction, which is nothing more or less than a conditional sale of the property with the delivery of possession. A sale for \$250, with a provision for the payment of one-half of it, and the consummation of the sale upon the payment of the other half. And if this is the correct character of the paper, if our interpretation of it be right, the plaintiff is chargeable with having transferred the property with a purpose to sell, to the custody and control of Myers, and has not provided in such a manner as the law requires, for reserving his lien upon it under the transfer.

The equity in this property passed with the possession into Myers. Fifty dollars of his money had gone into the purchase of the property, and whatever of excess over a reasonable hire went to the purchase price. Such was the purpose of the parties, and when Bridget made this instrument and transferred the property to Myers, he advertised Myers as the owner of it, as far as a *bona fide* purchaser for a full consideration is concerned. The presumption is that the possessor of personal property is its owner, and the world have a right to deal with him as such. They deal at their

retail liquor business in Washington, and being embarrassed and unable to meet his maturing obligations, and with a desire of saving his property from sacrifice, on the last named day, he made an arrangement with Hoover, his son-in-law, by which all his stock in trade and the business which he had theretofore carried on, was transferred to Hoover, and thereafter the business was conducted in Hoover's name ; that this said sale and transfer was totally without consideration, for the purpose of placing the stock of goods beyond the claims of the creditors of Gautier, and were in fraud of the plaintiffs' rights ; that Hoover had caused the stock of goods to be advertised for sale at auction on the 3d of March, 1877 ; that Hoover is entirely insolvent ; that if the sale should take place, the proceeds would pass into his hands, and the plaintiffs would be unable to collect any part of their judgment ; and they prayed that Hoover may be enjoined from selling or interfering with the stock of goods until the hearing ; that the pretended sale of Gautier to Hoover be decreed to be fraudulent and void, and that a receiver be appointed to take possession of the goods and make sale thereof ; and after paying the expenses, to pay the plaintiff the amount of his judgment, and bring the remainder into court for the benefit of the other judgment creditors of Gautier who may come in and contribute to the expenses of the suit, and for further relief.

A restraining order was issued, as prayed.

On the 16th of March the plaintiffs filed an amended bill in which they alleged that they had since ascertained that Elias Travers who was the landlord of the store in which Gautier and Hoover had been carrying on business, had a large claim against Hoover for rent, and that Travers had instituted proceedings in attachment under the landlord and tenant act ; that the attachment had been levied by the marshal upon the goods described in the original bill, and that by an arrangement between the landlord and Hoover, so much of the goods as were sufficient to satisfy the claim of Travers for rent was to be sold at the sale advertised, and the balance of the stock was to be returned

to Hoover. They aver that the goods never belonged to Hoover, and were not subject to the landlord's lien for rent due by Hoover to Travers; that Travers was about to apply to the circuit court for judgment of condemnation of said goods, and the prayer of the amended bill is that he should be required to answer, and that Travers may be restrained from applying to the circuit court for condemnation in the attachment proceedings or from taking any further steps therein until the further order of the court.

Gautier filed his answer in which he admits all the allegations of the bill.

On the 29th of March Hoover filed his answer in which he alleged that he, together with a certain Griffin, purchased for a valuable consideration, all the interest of Gautier in the stock of goods; and he set forth circumstantially the various payments and securities he claimed to have given for the goods. He averred that a part of the purchase money is unpaid because unsettled accounts between Gautier and himself were pending. He denied that he had caused the goods to be advertised for sale, or that he had agreed or colluded with any one for the purpose of defrauding any one, but states that he was indebted to Travers for rent, and that the advertisement spoken of in the bill was made by the marshal, under an order of condemnation, at the suit of Travers.

The answer of Travers was filed on the same day. He avers that Gautier had been a yearly tenant of his for many years, at a rent of \$250 a month, of the property on Pennsylvania avenue; that he was informed and believes that Hoover and Griffin bought out all the interest of Gautier in the stock in trade, and continued the business under the style of Hoover & Co.; that he accepted them as his tenants from the 1st of April, 1875, at the rent of \$250 a month, and that his said tenants being in arrears on the 30th of December, 1876, he issued an attachment for \$573 for rent in arrear up to the first of the said month of December; that on the 12th of February, 1877, he issued another attachment for two months' rent for the months of Decem-

ber, 1876, and January, 1877 ; that both these attachments were levied by the marshal on the 12th February, 1877 ; that he obtained judgment of condemnation on the 6th of March, 1877, on which execution was issued, and the property was advertised to be sold on the 20th of March.

On the 29th of March, 1877, the court passed a decree reciting that the case coming on to be heard upon bill and answers, and being argued by counsel, it is thereupon by the court adjudged, ordered and decreed, that the restraining order heretofore granted, should be discharged, and that the two judgments of condemnation for rent be paid, and that the residue of the said sum of money remaining in the hands of the marshal should be retained by him until the further order of the court.

Afterwards, on the 10th of January, 1878, the cause came on to be heard on the pleading and evidence, and was submitted to the court, and it was ordered and decreed that the sale of the stock of goods by Gautier and Hoover should be held fraudulent and void ; that Hoover had no interest or title therein by virtue of the sale, and the plaintiffs were allowed to file a further amended and supplemental bill for the purpose of making an issue with the defendant Travers as to the right of the landlord to the fund in the hands of the marshal under and by virtue of the landlord's lien for rent. This second amended and supplemental bill averred that Travers, on the 1st of April, 1875, accepted Hoover and Griffin as tenants ; that on the 12th February, 1877, the tenancy terminated by the action of the defendant Travers in seizing the stock of goods and taking possession of the premises under writs of attachment for rents sued out by Travers, and that from that day Travers was not entitled to any lien for rents accrued after that time, nor was he entitled to demand rent from Hoover after the 12th of February, 1877, and that he has no claim upon the fund in the hands of the marshal for rents accrued after that day.

It further averred that Travers on the 18th of December, 1876, filed a declaration against Hoover and Griffin, and caused a summons and attachment to be issued thereon, but,

by his attorney, directed that the writ should not be served until the 12th of February, 1877, when service was made, and the action, therefore, was not, in legal contemplation, brought until this last day. That in this action Travers sued for three months' rent from August 1st, 1876; to December 1st, 1876, at the rate of \$250 a month, upon which he claimed a balance of \$575, and a judgment for that amount with costs was rendered in his favor on the law side of the court and judgment of condemnation entered; and that he has been paid the same in full out of the proceeds of the sale of the goods; that the landlord's lien did not cover any part of the time sued for, except from the 12th November, 1876, to the 1st December, 1876, a period of eighteen days, which amounted to \$150, and that the landlord was entitled only to a judgment of condemnation for the sum of \$150. That on the 12th February, 1877, Travers brought a second suit for two months' rent from December 1st, 1876, to February, 1877, and the attachment in this case was levied on the 12th February at the same time with the levy of the attachment in the first case, and in this second suit judgment of condemnation by default was rendered in favor of Travers for the said sum of \$500, and that the said judgment had been fully paid to Travers out of the proceeds of the said sale of goods. That on the 6th day of March, 1877, Travers brought a third suit against Hoover and Griffin for rent from February 1st, 1877, to March 1st, 1877, for \$250, under which an attachment was levied on the fund in the hands of the marshal and a judgment of condemnation for that sum with interest and costs was also rendered, and that Travers claims the balance of the fund in the hands of the marshal to satisfy this third judgment. They averred that Travers has received out of the fund more than was covered by his lien, supposing him to have been entitled to a lien, and they claimed that he should be required to repay the excess beyond what he was entitled to receive, which was only for the part of the three months before the 12th February, 1877, reaching back to November 12th, 1876, and covering only eighteen days up to the 1st of December, 1876; and that

the whole fund remaining in the hands of the marshal should be paid over to the plaintiffs.

The decree passed in September, 1880, supported this view of the plaintiffs, and declared that Travers was only entitled to have received from the marshal upon the first of his judgments the sum of \$150 ; that the sum of \$423.32 in excess of what he was entitled to have, which was paid to him by the marshal should have been paid to the plaintiffs upon their judgment, and the defendant Travers was ordered to pay to the plaintiffs that sum with interest within thirty days from this date.

From this decree Travers appealed.

MILLS DEAN and S. S. HENKLE for complainants.

R. P. JACKSON for defendant Travers ; and J. J. JOHNSON for defendant Hoover.

Mr. Justice HAGNER, after stating the case as above, delivered the opinion of the court.

It is contended on the part of the plaintiffs that the order of the 29th of March, 1877, which directed that the first two judgments of condemnation should be paid to Travers, was erroneous and should be reversed. No appeal was entered by Gibson from that order, and the marshal in obedience to its direction paid over the money to Travers ; but it is nevertheless insisted that the decree of the 18th of September, 1880, was a reversal of the previous order although passed three years and a half thereafter. This last decree was passed upon the case presented by the second amended and supplemental bill which the court allowed to be filed "simply for the purpose of making an issue with the defendant Travers as to the right of the landlord to fund in the hands of the marshal, under and by virtue of the landlord's lien for rent," and was entered nearly a year after the money had been paid over by the marshal on the first two judgments to Travers.

The leave granted to file the last supplemental bill did not reserve the right to raise any question as to the order of the 29th of March, 1877, and in our opinion its propriety was not before the court in September, 1880.

But if it had been, we think the order of March, 1877, was correct, and should have been sustained.

The right of a landlord to a preference claim upon the goods of his tenant for rent has been acknowledged for centuries by the law, and judges have always insisted that its existence was greatly for the interest of tenants, especially of the poorer class, as without such a right, landlords would be averse to entrusting their property to the needy, who might actually be left without a shelter from the elements.

Chancellor Kent declares that the existence of this right inculcates frugality, industry and caution in tenants, and that the absence of some such provision would tend to check the growth of cities. Hence this was constituted one of the few exceptional cases in which by the law a man was allowed to be his own avenger, and by the hands of a bailiff of his own appointment, to seize and sell the chattels of the tenant found in the house.

By the Revised Statutes of the District it is provided :

“SEC. 677. The power claimed and exercised as of common right by every landlord of seizing by his own authority the personal property of his tenant for rent arrear is abolished.”

“SEC. 678. The landlord shall have a tacit lien upon such of the tenant's personal chattels, on the premises, as are subject to execution for debt, to commence with the tenancy and to continue for three months after the rent is due, and *until the termination* of any action for such rent brought within the said three months.” The statute further provides that this lien may be enforced by attachment, by judgment, or by action against the purchaser of the goods.

It is insisted upon the part of the plaintiff that the recovery of their judgment and the return of *nulla bona* created a prior and inconsistent lien which should prevail in equity against the lien of the landlord in this case.

At the common law a landlord lost his lien upon the tenant's goods after the sheriff had levied upon them, for an execution took precedence of all debts except specific liens. Taylor's Land. and Tenant, Sec. 598.

By the statute of VIII Anne, ch. 14, it was provided that "after the 1st day of May, 1710, no goods or chattels, &c., lying or being upon any messuage, lands, &c., which are or shall be leased for life or term of years, or otherwise, shall be liable to be taken on any execution on any pretence whatsoever, unless the party at whose suit the said execution is sued out shall, before the removal of such goods off the premises by virtue of such execution, pay to the landlord of said premises or his bailiff all such sums as shall be due for rent for the premises at the time of the taking such goods or chattels by virtue of such action, provided said arrears as do not amount to more than one year's rent," &c.

The statute was always in force in Maryland. (See *Washington vs. Williamson*, 23 Md., 252). And as it was in force there in February, 1801, it is the law of this District.

To compel the sheriff to pay over one year's rent the landlord may move the court out of which the execution issues for an order to pay the amount due him from the sale, and this motion may be made at any time before the money is paid over, the sheriff being bound on receipt of a landlord's notice to retain the money.

In *Longstreth vs. Pennock*, 20 Wallace, 576, on an appeal from Pennsylvania, where a similar statute is in force, it was decided that a landlord, having a right to distrain for rent in arrear, at the date of the issuing of the warrant in bankruptcy, was entitled to be paid in full by the assignee of the bankrupt, before the removal of the goods, one year's rent, in preference to all other creditors.

The existence of this right inflicts no hardship upon the ordinary creditor. The rights of the landlord are regulated by law, and all dealing with the tenant must be supposed to have understood them. His lien is a preference by common right, where not given by statute. His right begins with the lien which can only be acquired by others, as the result of a judgment. The landlord trusts the tenant with his property upon the faith of this privilege. As the statute makes the rent a valid charge prior to the right of execution creditors, it necessarily lifts up the lien of the rent above any lien of

other creditors. Hence, if there had been a levy under the plaintiff's judgment, instead of a return of *nulla bona* and a sale by the marshal under that levy, we hold that the marshal, after notice duly given to him by the landlord, would have been obliged to pay from the proceeds all rent due for a period not exceeding one year, up to the time of the sale, and that if the sale took place during the month, there would have been no division of the rent for that month. See *Joyce vs. Wilkenning*, 1 Mac Arthur, 567.

In *Morgan vs. Campbell*, 22 Wallace, 38, the Supreme Court construed a provision of a statute of Illinois which declared "every landlord shall have a lien upon the crops growing or grown upon the demised premises in any year for rent that shall accrue for such year." After stating the probable reason for the enactment of the law, they say, "be this as it may, the statute does in express terms confer a lien upon the crops growing or grown upon the demised premises in any year for the rent of that year, and recognizes for other personal property in the county the right of distress as it existed at common law. At common law the landlord could distrain any goods found upon the premises at the time of the taking, but he had no lien until he had made his right active by actual seizure. A statutory lien implies security upon the thing; before the warrant to seize it is levied. It ties itself to the property from the time it attaches to it, and the levy and sale of the property are only means of enforcing it. In other words, if the lien is given by statute, proceedings are not necessary to fix the status of the property. But in the absence of this statutory lien, it is necessary to take proceedings to acquire a lien upon the property of the tenant for the benefit of the landlord. This the landlord is enabled to do in a summary way to satisfy the rent which is due him, and in this he has an advantage as creditor over creditors at large of the tenant."

Nor do we think the lien of the landlord was lost or impaired by the order of his attorney to suspend a sale under the attachment. Whether such an order in other cases might have had the effect contended for by the plaintiffs,

we do not think it could have impaired the statutory lien which already existed before the declaration in the case was filed, and the landlord's forbearance to enforce his right for a month would not have had the effect to destroy the lien.

In *Walker vs. Barton*, 2 Br. Reports, 365, it was decided that the landlord's lien is not waived by an agreement to forbear to distrain upon condition that the property shall remain on the premises.

We think, therefore, that the order of the 29th of March, 1877, even if it were examinable now, should be sustained as being based upon correct principles.

The remaining question is as to the disposition of the money in court amounting to \$318.84.

The third attachment was issued on the 6th day of March, 1877, and on the 9th it was laid on the goods then in the custody of the marshal on the premises under the previous attachment.

On the 20th the goods were sold by the marshal. It is insisted by the plaintiffs that the landlord had no right to seize, under this attachment, goods already in the custody of the law, and that the attempted levy under the third attachment was, therefore, void. But, in our opinion, when this attachment was issued the landlord had a statutory lien upon the goods then on the premises and the circumstance that they were then in the custody of the marshal could not destroy his lien.

In the case of *Holdane vs. Sumner*, 15 Wallace, 605, the supreme court had occasion to construe the provision of the code of Louisiana, regulating the right of the landlord to recover rent.

According to that code the landlord has, for the payment of his rent, a right of pledge on the movable effects of the lessee found on the property leased, and may seize them within fifteen days after their removal from the property by the lessee. In the particular case, the tenant, a corporation, undertook, in supposed pursuance of the insolvency act, to make a *cessio bonorum* for the benefit of its creditors generally, and the appropriate court accepted the cession,

and directed that all judicial proceedings against the property be stayed ; and the syndic took possession of the goods and sold them. It was afterwards decided by the appellate court of the State that a corporation was not included in the expression "any person in the insolvency act," and was not, therefore, entitled to make a *cessio bonorum* ; and the order staying proceedings against the property in the hands of the syndic was therefore vacated. But it was held that, notwithstanding the decree of the court, which stayed proceedings on the part of the landlord to follow the goods and make his rent, was void, still his lien remained.

The Supreme Court says: "But when the goods are in *custodia legis*, as where they are seized by a sheriff under an execution, or are placed in the hands of a syndic under a *cessio bonorum*, the lessor cannot exercise this power of seizure and does not lose his privilege by not exercising it, but said privilege attaches to the proceeds of the property in the officer's hands."

By the provisions of section 678 of the Revised Statutes of the District, the tacit lien of the landlord "shall continue for three months after the rent is due and until the *termination of any action* for such rent brought within the said three months."

His lien for the months of January and February, 1877, undoubtedly existed on the 6th of March, when the declaration was filed, and continued until the termination of those proceedings, and was not destroyed by the fact that the goods which the law had said should be subject to his lien, were at the time of issuing the attachment in the custody of the law.

We are, therefore, of opinion that the rent for those two months should be paid to the landlord out of the fund in the marshal's hands. The residue is to be paid over by the marshal to the plaintiffs upon their judgment.

EDWIN M. LEWIS, *Trustee* v. ALEXANDER R. SHEPHERD.

AT LAW. No. 13,735.

{ Decided March 2, 1881.

{ The CHIEF JUSTICE and Justices WYLIE and HAGNER sitting.

1. The court in General Term will hear a motion for a new trial upon a bill of exceptions, notwithstanding no motion for a new trial had been made in the court below.
 2. An alteration by the endorsee or his agent increasing the rate of interest upon a promissory note if made without the knowledge or consent of the endorser and after it has passed out of his hands, is a serious and material change in the promise, and is sufficient to discharge him.
 3. A declaration in assumpsit consisted of a special count against the defendant as endorser of a promissory note, and also of the common money counts, having annexed thereto, as the only bill of particulars, the note sued on, the defendant being also the maker thereof. On the trial the note was shown to have been materially altered, as to the rate of interest, by the endorsee or his agent, after endorsement, and without the endorser's knowledge or consent.
- Held.* That by reason of the alteration of the note there could be no recovery upon the special count. Neither could there be a recovery upon any of the common counts for, in addition to the infirmity of an altered note as a bill of particulars, a liability as endorser does not imply a further liability by reason of the money that was advanced upon the note.

STATEMENT OF THE CASE.

MOTION for new trial upon exceptions.

The plaintiff, trustee of the estate and effects of Jay Cooke & Co., bankrupts, and late bankers, in Washington, D. C., sued the defendant, Alexander R. Shepherd, in assumpsit upon a promissory note made and endorsed by him to Jay Cooke & Co. before they became bankrupts. The declaration consisted of a special count against the defendant as endorser, with the common money counts added. To the latter was annexed, as a bill of particulars, the note sued on, as follows:

“ Particulars of Demand.

“ \$2,500. WASHINGTON, D. C., *December 6, 1872.*

“ One day after date I promise to pay to the order of myself, two thousand five hundred dollars, at the banking house of Jay Cooke & Co., value received, and interest at 9 per cent.

“ ALEX. R. SHEPHERD.

“Endorsed : Alex. R. Shepherd.”

The defendant pleaded :

“Not indebted as alleged.”

“Did not make the promissory note.”

On the trial, William M. Tenney, a witness for plaintiff, testified, “that he was connected, during the month of December, 1872, with the banking house of Jay Cooke & Co., as confidential clerk and manager ; that this note was received from the defendant by Mr. Henry D. Cooke, one of the firm of Jay Cooke & Co., and he gave him the money for it. When I saw the note I objected to the rate of interest, which, in the way the note was drawn, would have been only 6 per cent. I therefore called Mr. Cooke’s attention to it, and told him we should have a higher rate of interest than that. He said that the understanding with Mr. Shepherd was that he was to pay 9 per cent. interest on the note. I therefore added the words, “at nine per cent,” as a memorandum for my guidance when the note should be paid.”

The signature and endorsement of the note having been proved to be in the handwriting of the defendant, the plaintiff offered the same in evidence, but the court refused to admit it for any purpose. Whereupon the plaintiff, to establish his claim under the common money counts, offered to prove from the cash-book of Jay Cooke & Co. that, on the 6th day of December, 1872, a note of Alexander R. Shepherd for \$2,500 was negotiated by Jay Cooke & Co., and \$2,500 paid by them on the note. To this the defendant objected, but the court overruled the objection ; the defendant excepting thereto. The plaintiff then made good his offer and rested his case. Whereupon the defendant, after having testified that he received no consideration for the note, but received the money thereon for a third party to whom he paid it over in the bank, and that the words, “at 9 per cent.” had been added to the note by some other person and without his knowledge or consent, and that the same had been done after it had passed out of his hands, rested his defense, and prayed the court to instruct the jury that—

“If the jury believe from the evidence that the note declared on, when made and passed to Jay Cooke & Co., did not bear the words, ‘at 9 per cent.’ and that in consideration of said note, the said Jay Cooke & Co. paid the sum of \$2,500 ; and that thereafter the said Jay Cooke & Co. altered or caused to be altered said note, by adding the said words and figures, ‘at 9 per cent.,’ the plaintiff is not entitled to recover upon either count of the declaration.”

The court refusing to grant this prayer, the defendant, after excepting, asked the following :

“If the jury believe from the evidence that the note sued on was originally drawn with the words ‘and interest’ ; and, after being delivered to Jay Cooke & Co., (if it was so delivered) it was altered by said Jay Cooke & Co., or by their agents, upon misrepresentations made to Tenney by Henry D. Cooke, by adding after those words, the words and figures ‘at 9 per cent.,’ with fraudulent intent to measure and change the liability of the defendant, and without his knowledge or consent, then the plaintiff is not entitled to recover.”

Which prayer the court also refused, the defendant noting his exception.

The court thereupon instructed the jury that the note set forth in the special count of the declaration, having been altered in a material matter had been ruled out of the case and excluded from their consideration, but that the case was submitted to them on the evidence as to the reception of the money by the defendant and from whom he received it.

Verdict for the plaintiff for \$2,500 without interest.

A motion for a new trial was not made by the defendant within four days after the verdict, nor was it ever made in the court below. Accordingly, when the defendant tendered his bill of exceptions to the court for its approval, the plaintiff interposed and objected to the signing of the same on the ground that, as no motion for a new trial had been made under the 60th and 61st Rules of Practice, the justice presiding had no power to sign and seal the exceptions. But

the court overruled (*pro forma*) the objection of the plaintiff, and signed and sealed the exceptions. To which ruling the plaintiff, before the bills of exceptions were signed and sealed, excepted, the court signing and sealing the same.

WALTER DAVIDGE for plaintiff.

A. C. BRADLEY and W. F. MATTINGLY for defendant :

1. The Rules of Practice do not require any motions for new trials to be made within four days after verdict, except such as are to be heard by the justice who tried the cause ; they make no requirement as to the time or place of filing a motion for a new trial on a bill of exceptions. Rules 61-64. A motion made in the court in General Term is sufficient, and such motion was filed on the first day of the term. *McPherson vs. Cox*, Wash. L. R., Vol. 6, p. 255. *O'Neal vs. The District of Columbia*, Ib., 332. In this cause judgment was entered upon the same day with the verdict, April 21, 1830, the bill of exceptions was filed May 8, and on May 15 an appeal to this court was entered. Upon this appeal the court will consider all questions presented by the bill of exceptions. R. S. D. C., sec. 772. Rules of Practice, 91. Our statute is similar to the New York system and "draws its inspiration" therefrom, (*O'Neal vs. District of Columbia*, *supra*), and such practice is sustained there. *Morrison vs. N. Y. & N. H. R. R.*, 32 Barb., 568 ; *Watson vs. Scriven*, 7 How., Pr. 9 ; 20 How. Pr., 257 ; 11 How., Pr. 285 : 4 E. D. Smith, 510.

2. The alteration was material, and voided the note. 2 Parsons on Notes and Bills, 545-9 ; 2 Dan'l Neg. Instr., 338-348 ; *Lee vs. Starbird*, 55 Me., 491 ; *Neff vs. Horner*, 63 Pa. St., 330 ; *Fay vs. Smith*, 1 Allen, 477 ; *McGrath vs. Clark*, 56 N. Y., 36 ; *Evans vs. Foreman*, 60 Mo., 449, 452 ; *Fulmer vs. Seitz*, 68 Pa. St., 237. The question of materiality was for the court to determine. *Wood vs. Steele*, 6 Wall., 80.

3. The alteration was in the interest of the bank, was made by the confidential clerk and manager of the bank, upon consultation with one of the firms, and was the act of the bank. The note passed into the firm's assets, and is sued upon in

its altered state. If not the act of the bank and if done without the knowledge or consent of the firm, the burden was upon the plaintiffs to show it. 2 Pars. N. & B., 574-7 ; *Heffner vs. Wennrich*, 32 Pa. St., 423 ; *Neff vs. Horner*, *supra* ; *Davis vs. Carlisle*, 6 Ala., 707 ; *Henman vs. Dickinson*, 5 Bing., 183 ; *Simpson vs. Stackhouse*, 9 Barr., 186.

4. If the alteration was made with a fraudulent intent it vitiated the entire transaction and the plaintiff was not entitled to recover either upon the note or the common counts. 1 Pars. N. & B. ; 1 Daniels' Neg. In. ; *Smith vs. Mace*, 44 N. H., 568. The question of fraud and intent was a question for the jury. *Bowers vs. Jewell*, 2 N. H., 543 ; *Davis vs. Carlisle*, *supra* ; *Jones vs. Ireland*, 4 Iowa, 70 ; *Beaman vs. Russell*, 20 Vt., 215.

Mr. Chief-Justice CARTER delivered the opinion of the court.

Edwin M. Lewis, trustee of the estate and effects of Jay Cooke & Co., brings this action in assumpsit upon a promissory note executed by the defendant, Alexander R. Shepherd, to himself and by him endorsed. In the hands of Jay Cooke & Co. the note underwent a very serious alteration. As originally executed it was a note without interest. As sued upon and presented in proof it was a note with interest at 9 per cent., a very material and serious change in the promise ; a change of such a character and import that the justice trying the case would not allow the note to be given in evidence as a promise of the defendant. The note having been thus taken from the consideration of the jury, the special count in the declaration predicated upon it was abandoned, and the plaintiff passed over to the common count for money had and received. Here the court permitted the plaintiff to enter the field of proof to substantiate his claim, which was based, we suppose, upon the consideration of the note ; and the first difficulty presented in considering the ruling of the court below, is that, attending the common count, was a bill of particulars consisting of nothing more than this very note which had been made the subject of the

special count. Now how this note could be good for nothing in one place and good for something in another is the puzzle that we have had to resolve; and we have come to the conclusion that the common counts with this note annexed as a bill of particulars is a little worse than the special count; for it is patent from the testimony in the case that the defendant's liability was a liability under his undertaking as an endorser, which does not imply a further liability by reason of the money that was advanced upon the note. In addition to which the common count upon which the recovery was had was damaged with the same infirmity, by reason of the altered note as a bill of particulars, that existed in the special count predicated upon this same note. We consider these objections fatal.

The case is remanded for a new trial, with liberty to the plaintiff to amend as he may be advised.

THE DISTRICT OF COLUMBIA

vs.

J. H. & E. K. JOHNSON.

LAW. NO. 19,485.

{ Decided March 2, 1881.

{ The CHIEF JUSTICE and Justices WYLIE and HAGNER sitting.

1. Distinction between public and private wharves on the river front of the city of Washington.
 2. The corporation charter of the city of Washington gave the latter power to control and make disposition of public wharves and to regulate and police private wharves.
 3. The corporation of Washington, in December, 1867, passed an ordinance granting authority to defendants to construct a wharf at a point on the river front of the city in consideration of the payment of an annual rent of \$1000 for the term of ten years. The ordinance was to take effect on the execution by the grantees of a bond to fulfill the requirements of the ordinance. The grantees gave the bond and entered into possession. In 1878, the District of Columbia brought an action to recover the accrued rent.
- Held*, That the grantees by entering into possession of the premises and accepting the terms of the ordinance made the latter the written

memorandum of the contract, which was of itself sufficient to take the case out of the statute of frauds, although if necessary the court could find an additional memorandum in the execution of the bond under the requirements of the ordinance.

Held, also, that the District of Columbia was the proper party to bring the action.

4. It is error to admit in evidence an alleged ordinance of the corporation of Washington without further proof of its enactment, than the fact of finding it printed in a publication entitled, "Laws of the Corporation of the City of Washington passed by the Sixty-fifth Council. Printed by order of the Council. Washington. R. A. Waters, printer, 1868."
5. The lessee will not be allowed to dispute his lessor's title after he has acknowledged it and entered into possession, but if he has never taken possession under that title, or if the estate has never existed which it is claimed was contracted for, the lessee may show it and it is error for the court to take from the jury evidence bearing upon that point.
6. It is the province of the jury, and not of the court, to estimate under the proof the damages in an action for rent. This is the uniform rule and practice, and if the court take the case from the jury as to the amount to be recovered, it will be error.

STATEMENT OF THE CASE.

MOTION, by both parties, for new trial on exceptions.

This was a suit instituted by plaintiff to recover from the defendants \$15,000 for rent of a wharf on the Potomac river, between Twelfth and Thirteenth streets west, in the city of Washington. Plaintiff's declaration was as follows :

"The plaintiff sues the defendants for that, at their special instance and request heretofore, the Board of Aldermen and the Board of Common Council of the Corporation of Washington, on the seventh day of December, 1867, at the City Hall in said District of Columbia, passed a special ordinance, which was duly approved by the mayor of said city on said day, whereby said J. H. and E. K. Johnson were permitted and authorized to construct a wharf on the Potomac river, at a point between Twelfth and Thirteenth streets west, and erect thereon such buildings as might be necessary in the fishing business ; said wharf to be constructed pursuant to the first section of the act of January 8, 1831, and to be completed within one year. In consideration of which said grant, the defendants were to pay to the corporation of Washington the annual rent of \$1,000, quarterly, for a term

of ten years ; said rent to begin at and from the time of the completion of said wharf, and end ten years from the passage of said act ; said wharf to be kept as required by the second section of said act of 1831.

“And the plaintiff further says that the defendants accepted the terms and provisions of said act, entered upon the premises, erected said wharf and buildings, completing the same February 1, 1868, and have had and enjoyed the same from that time hitherto, and thereby became and were liable to pay to said corporation of Washington from the 1st day of February, 1868 until the 1st day of June, 1871, the rent at the rate of \$1,000 per year, and from said 1st day of June, until the commencement of this suit, said rent was and is due to the plaintiff ; for all of which rent the plaintiff brings this suit, with interest from the various dates at which the same became due under said act, an authorized copy of which is to the court here shown.

“ And also for the sum of \$15,000 for rent of a wharf on the Potomac river, between Twelfth and Thirteenth streets west, holden by the defendants of the plaintiff. Also for \$15,000 due the corporation of Washington for rent of wharf.”

The defendant pleaded the general issue and the statute of limitations, upon which issue was joined.

On the trial the plaintiff, to maintain the issue on its behalf, offered to read in evidence to the jury from a publication entitled “Laws of the Corporation of the City of Washington, passed by the Sixty-fifth Council. Printed by order of the Council. Washington. R. A. Waters, printer. 1868” : an alleged ordinance of the late Board of Aldermen and Board of Common Council of the city of Washington, as the ordinance referred to in the plaintiff’s declaration, without further proof of its enactment than the fact of finding it printed in the above publication.

This ordinance was entitled, “ An act granting permission for the construction of a wharf on the Potomac river, between Twelfth and Thirteenth streets west,” and authorized J. H.

and E. K. Johnson to construct, at their own expense, and pursuant to the provisions of the first section of the act of January 8, 1831, a wharf and buildings located as above, in consideration of the payment by them to the corporation of Washington of the annual rent of \$1,000 for ten years from the date of the act (December 7, 1867), at the end of which time they were to convey the said wharf and all its appurtenances to the corporation free of any cost or charge therefor. By a provision of the fourth section the act was not to take effect until a bond in the sum of \$6,000, conditional to a "faithful fulfillment of all the requirements of this act," had been executed by the grantees.

To the reading of this alleged ordinance the defendants objected on the grounds—

"1. That there was no sufficient proof that said pretended ordinance had ever been passed or was an ordinance of the late Mayor, Board of Aldermen, and Board of Common Council of the city of Washington.

"2. Said Mayor, Board of Aldermen, and Board of Common Council of said city had no power to pass into a law any such bill or ordinance.

"3. Said Mayor, etc., had no jurisdiction over the subject-matter."

The court overruled the objection, and permitted the ordinance to be read. The defendant excepting to the ruling of the court.

The plaintiff also proved, by producing the original, an ordinance passed by the same corporation on the 22d of January, 1868, amending the ordinance of December 7, 1867, so as to make the wharf therein authorized to be erected one of the established fish wharves having the exclusive privilege of receiving and landing such fish as should be brought to the city of Washington.

The following bond given by the defendants in pursuance of the fourth section of the ordinance of December 7th, 1868, above mentioned, was then put in evidence by plaintiffs:

“Know all men by these presents, that Mr. James H. Johnson and E. K. Johnson, and Charles B. Church, all of Washington county, in the District of Columbia, are held and firmly bound unto the Mayor, Board of Aldermen and Board of Common Council of the city of Washington, in the full and just sum of six thousand dollars, current money, to be paid to the said Mayor, Board of Aldermen and Board of Common Council, their certain attorney or successor in office, for which payment well and truly to be made and done we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 7th day of February, one thousand eight hundred and sixty-eight.

“Now, the condition of the above obligation is such that if the above bounden James H. Johnson, E. K. Johnson, their heirs and assigns, do and shall faithfully, diligently and honestly execute, perform and fulfill all and singular the requirements of an act passed and approved December 7th, 1867, by the corporation of the city of Washington, entitled an act granting permission for the construction of a wharf on the Potomac river, between Twelfth and Thirteenth streets west, granting to the said Johnsons privilege to erect and maintain a wharf on the Potomac river, between Twelfth and Thirteenth streets; and also at the end of ten years to relinquish and convey to said corporation the said wharf and all of its appurtenances; then the above obligation to be void, otherwise to be and remain in full force and virtue.

JAMES H. JOHNSON. [L. S.]

E. K. JOHNSON. [L. S.]

CHAS. B. CHURCH. [L. S.]

“Signed, sealed and delivered in presence of—

O. S. BAKER.

“Approved.

“RICHARD WALLACH, *Mayor*.”

Evidence was also introduced to the effect that in the year 1867, and in January and February, 1868, the defendants were attempting to obtain from the late Mayor, Board

of Aldermen and Board of Common Council of the city of Washington the exclusive privilege of receiving at a wharf proposed to be erected by them, the fish which should be brought to the city of Washington, and for that privilege were willing to pay the corporation one thousand dollars a year; that the corporation claimed the power to grant such privilege, and had before that time exercised that assumed power in favor of other parties; that the defendants were the same parties named in the ordinance of December 7, 1868; that they were partners in the fish wharfing business, and took possession of the premises under this ordinance and executed the bond above mentioned.

The plaintiff then rested his case.

Whereupon the defendants, by counsel, moved the court to instruct the jury, that upon the evidence the plaintiff was not entitled to recover, because of any of the following grounds :

1. That the plaintiff had offered no testimony to show that the corporation of Washington city had title to or possession of the premises in question, or that the defendants were placed in possession of said premises by the plaintiff.

2. That said corporation had no legal power to grant licenses to erect private wharves on the Potomac; and the special ordinance sued on was *ultra vires*, null and void.

3. Under section 95 of the Revised Statutes of the District of Columbia, the charter of the city of Washington is continued in force for the purpose of collecting sums of money alleged to be due said city, and enforcing contracts made by it. The District of Columbia is not the proper plaintiff.

The court refusing so to instruct the jury, the defendant, after excepting to the ruling of the court, introduced evidence tending to show that the wharf and premises mentioned in the plaintiff's declaration were at the time of the passage of the ordinance of December 7, 1867, in the possession of one John Pettibone, who claimed to hold under the United States and not under the corporation of Washington, but adversely thereto; and that on January 18, 1868, Pettibone obtained from the Chief of Engineers of the Army of the

United States a written permit or license "to erect, keep, and maintain two good and substantial wharves on the Potomac river, in said city (Washington), not less than eighty-four (84) feet wide, and to extend from the water side of Water street between Twelfth and Thirteenth streets west, to the channel of said Potomac river." This paper, which was *captioned* "Office of Public Buildings, Grounds, and Works, Washington, January 18, 1868," purported on its face to have been issued "by command of Brigadier-General Humphreys, Chief of Engineers, * * * by virtue of the power vested in him, by the act of the assembly of Maryland, passed December 19, 1791, to license 'the building of wharves in the city of Washington, in the District of Columbia, and to regulate the materials, the manner and extent thereof,' and the several acts of the Congress of the United States subsequently passed and approved, substituting the said Chief of Engineers in the place and stead of the Commissioners in said act of assembly mentioned, and vesting in him the powers, and requiring of him the discharge of the duties vested in and required of the said Commissioners;" and was signed "N. Michler, Major of Engineers, Brevet Brigadier-General."

Defendants further introduced evidence to the effect that all of Pettibone's right and interest under this license had come to them by assignment from him; that Pettibone had always denied the right of the corporation of Washington to possession of said premises, and had never held under or of them, but of the United States; that the defendants, notwithstanding the passage of the ordinance of December 7, 1867, and of the ordinance of January 22, 1868, and of the subsequent execution of the bond by them, were not let into the possession by the plaintiffs, nor by the Mayor, Board of Aldermen, and Board of Common Council of said city, but by Pettibone, and that they claimed under him; that this adverse holding of Pettibone and defendants to the title of the corporation of Washington was well known to the corporation; that defendants, up to March 7, 1870, had paid the corporation of Washington \$1,740 in consideration of the exclusive "fish-wharfing" privilege supposed to

be secured to them by these special ordinances; that this fish wharfing privilege consisted of valuable fees granted by law and usage for every one thousand fish landed at a wharf, and was entirely distinct from the erection and ownership of a wharf; that the ordinance, not being enforced by the corporation, and fish having been allowed to be landed at a large number of other wharves in the city so as to render the privilege of no value to the defendants, they, on the 7th of March, 1870, requested the corporation to enforce the said ordinance; that the corporation failing to protect defendants, they, on a few days after the 7th of March, 1870, refused to pay any further sum to the corporation, and that they had never made any payment since that date.

The evidence being closed, the defendant requested the court to grant, among other prayers, the following:

1. If the jury find, from the evidence, that, on the 7th day of February, 1868 (the date of the bond), the possession of the premises for which rent is now claimed by the plaintiff, was in Mr. Pettibone under a license from, or by permission of, the United States, and he disclaimed the right of the late corporation, known as the Mayor, Board of Aldermen, and Board of Common Council of the city of Washington to said possession, and never acknowledged it; and further find from the evidence, that soon after, and before defendants obtained possession of said premises, Mr. Church and Mr. J. H. Johnson purchased from said Pettibone his right from the United States, and entered into possession of said premises under the right so purchased, and commenced the construction of the wharf thereon, and for several years thereafter continued in possession under the claim of ownership, by virtue of the right purchased as aforesaid; and further find from the evidence, that the defendants went into possession under said right and none other, and have since continuously occupied said premises under a claim of right by reason of said purchase, then the plaintiff is not entitled to recover.

2. That if the jury find that the party under which the plaintiff claims had no title to the premises in question at

the time of the pretended lease to the defendants, and has acquired no title thereto since said lease, and was not in possession at the time of said lease, then the plaintiff is not entitled to recover.

3. That the special ordinance of December 7th, 1867, sued on in this case, and the acceptance thereof by the defendants—if the jury should find said ordinance and acceptance proved—do not of themselves imply the relation of landlord and tenant ; and if the jury should find that the relation of landlord and tenant is not proved by other testimony, they should find for defendants.

The court refused to grant any of these prayers, to which refusal the defendants excepted. The court then instructed the jury that the plaintiff was not entitled to recover more than the rent which had accrued within three years before the commencement of suit, and thereupon instructed them to return a verdict against the defendants for \$3,000 with interest from the date of the commencement of this suit, to which instruction both plaintiff and defendants excepted.

A. G. RIDDLE for plaintiff :

The decision of the court in the steamboat company cases confirms my impression of the law that the United States, as owner of Water street, had the rights of wharfage along the Potomac river. Save by granting licenses or permits to erect wharves, the proprietor has in no way exercised any powers in the premises. It has never reserved rent for the use of nor attempted to exercise control, or enforce police regulations over wharves. Instead of which it created a municipal government with general powers of legislation and police over the territory where the property is situated ; and I submit that the power to regulate wharves is an incident to this general power, and armed the corporation with the right to collect a reasonable rent from the wharves to defray expenses incurred in their control.

The 7th section of the act of May 15, 1820, the charter of Washington, granted power over our public and private wharves. This statute was in force when the ordinance,

the act of January 8, 1831, was passed by the city (Webb's Dig., 425), which takes general jurisdiction of the whole subject. (3 Stats.)

The act of May 17, 1848, repealed the above, and the second section continued the power over fish wharves. (9th Stats., 223.) Under this act, which was continued till February 21, 1873, the corporation enacted the fish wharf ordinance of July 13, 1865. (Webb's Dig., 147.)

Upon an examination of the ordinance of December 7, 1867, it will be seen that it authorizes the erection of a fish wharf, which is a public wharf as well, and was clearly within the expressly granted powers of the corporation.

Clearly the record shows that the defendants went into possession under the ordinance, became the tenants of the plaintiffs, and are estopped alike by law, the ordinance, and their bond, from denying their resulting obligation.

The purchase of the Pettibone license gives them no right against the District.

As to the admissibility of the ordinance of December 7, 1867, it was published by the same authority as the other ordinances of the city. It was a public matter, and the court is now in the habit of taking notice of the ordinances of the corporation of Washington.

To the exception taken by the plaintiff to the ruling of the court, that the debt was by simple contract and within the rule of the three year limitation, my position is that the ordinance, the act or statute of the corporation, is of the grade at least of a sealed instrument. 1st Chitty Plead., 11 Am. Ed., p. 106; Jones v. Pope, 1 Saunders, 37; Croke Car., 513.

L. G. HINE and BIRNEY & BIRNEY for defendants.

1. Ordinance was improperly admitted. 1 Greenl. Ev., 480; Gilb. Ev., 10; Peake, 26.

2. *Ultra vires* of corporation. Taylor Land. & Ten., sec. 84, 85; Jackson v. Morrill, Cro. Car., 109; 4 Duer, 452; Statute of Frauds, 5, 7, 8.

3. Demurrer to evidence was well grounded. No title

shown in plaintiff. No power in plaintiff to license private wharves. Potomac Steamboat Cases; Law of Maryland, December 19, 1781; see Burch's Digest, 223; 2 Stats. U. S., 175; 3 Ib., 324; 14 Ib., 466.

Washington City the proper plaintiff. Statutes D. C., section 95.

Unless the plaintiff let the defendants into possession of the wharf premises it cannot recover. Doe v. Brown, 7 Ad. & E., 447.

Defendants went in under Pettibone, who held an adverse title to the city. Rogers v. Pitcher, 6 Taunton, 202; Gravenor v. Woodhouse, 1 Bing., 38; 1 B. & C., 694; 8 B. & C., 475.

If the plaintiff, or the party under which it claims, had no title to the wharf premises at the time of the pretended lease to the defendants, and has acquired no title thereto since said lease, and was not in possession at the time of said lease, plaintiff should not recover. Cleves v. Willoughby 7, Hill, 83; 1 B. & C., 694; 3 Hill, 330.

If the consideration inducing the defendant to take the so-called lease failed by reason of the neglect of the lessor to perform its part of the agreement, the plaintiff should not recover. Tomlinson v. Day, 3 Br. & B., 681.

As to the plaintiff's exceptions, the question of the incapacity of the lessee to dispute his landlord's title is not involved in the plaintiff's assignment of error. The action is assumpsit; the limitation three years. The evidence shows a disclaimer in 1870, with express notice to the pretended landlord, unbroken possession afterwards for more than eight years by one of the defendants, and no effort by the alleged landlord to assert its right. The disclaimer and notice dissolved the relations of landlord and tenant, if they had ever existed, and each party stood thenceforth on legal rights. The landlord acquiesced, and the statute of limitations beginning to run in 1870, barred the action in 1873, more than five years before this suit was begun. Willison v. Walkins, 3 Peters, 43; Ang. on Lim., 444; Peyton v. Smith, 5 Peters, 491; 7 Wheaton, 553; 3 John., 283; 2 Gill. & J., 173; 14 Peters, 162; 9 Wall., 601; 2 McLean, 399.

Mr. Chief Justice CARTER delivered the opinion of the court.

In the case of the District of Columbia v. J. H. & E. K. Johnson, while we have come to the conclusion that this action may be maintained by the plaintiffs, we are compelled, however reluctantly, to reverse the judgment and remand the case, that it may be tried under proper rules of evidence, and that the province of a jury may be exercised in the administration of justice. Most of the exceptions are addressed to incidental questions arising in the course of the trial, and relate to the admissibility of evidence in one form or another, several of them strike at the plaintiff's right to recovery, and become material in the case. One of the first of the objections taken by the defendant is that the city of Washington held no power over the leasehold or licensed estate; that the title did not reside in the city of Washington. Now, if that be true, if the city never had any title to this property, it could not obligate anybody to pay rent on account of it. Whether the city had title or not depends upon the limitations of the corporation charter. The charter gave it power to control and make disposition of public wharves, and power to regulate and police private wharves. It is claimed by counsel that this was a private wharf, and, therefore, the city of Washington had no right to make disposition of it; that its right was confined merely to police regulations. We do not think this objection well founded. The wharf in question is not a private wharf. The distinction between private and public wharves along the river front of the city and District is determined by the title to the property. A portion of the river front was held by private individuals as a personal grant, by deed, from the Government, with the right to make such disposition of the property as was compatible with the public easement in this river, and it was with reference to that description of property, that the distinction was taken between public and private wharves. We think there is nothing in this objection.

The next objection made to the right of recovery is, that even if the city of Washington did have title, there was no

contract between these parties. The plaintiff makes the contract to consist of a certain ordinance transferring the occupation, under given conditions, of the wharf between Thirteenth and Fourteenth streets to J. H. & E. K. Johnson upon their performing certain duties on their part and the payment of a thousand dollars a year rent. Here, then, was at least an attempt to make a contract. Here was a deliberate enactment of an ordinance that, if it had effect, would transfer possession of this property for occupation from the city of Washington to the defendants. If the city had control over the wharf, they had a right to make a contract in regard to it, and we see no impropriety in its being done in this manner. Instead of granting power to the mayor to enter into an indenture of lease with the party, the common council indentured the property themselves, and if the defendants accepted possession under this written declaration of the right to do it by the city of Washington, the ordinance became the memorandum or contract between the parties, and this will take the case out of the statute of frauds. It was only necessary for the tenant to accept the occupation upon the terms of the contract of the license, which was in writing. We think this disposes of that objection. But if it were necessary, the case furnishes the evidence of a written acceptance, according to the terms of the ordinance, under the signature and seal of the tenants. The ordinance provides that it should go into effect upon the execution on the part of the defendants, of a bond to the city of Washington in the penalty of \$6,000 for the performance of the conditions of the ordinance. That bond was executed and delivered, and, thereby, wedded to the ordinance. No written contract could have brought the parties nearer together than they were brought by this ordinance, and the bond executed in pursuance of its requirements. But just here we have one of the difficulties which compel us to send this case back. It was objected on the trial that proof was not made, that the ordinance of December 7, 1867, was enacted by the Common Council of the city of

Washington, but the court ruled that the ordinance proved itself.

Now, it is true that this is a purely technical objection, and it looks like trying the virtue of the law to pause and hesitate over it. Nevertheless, we do not see that we can do otherwise. The court cannot afford, under the light of the law, to declare that a document of this sort proves itself in virtue of itself. If that rule prevailed, it would demoralize all proof. Nor is this all; it would be setting a precedent utterly unauthorised by the law and would break up in every way the integrity of evidence. The rules of law in regard to the presenting of proof should be as faithfully guarded as any other features of the administration of justice. We think it was fatal to tolerate the presence of this ordinance as a factor in the trial, without having given it the sanction of proper proof. While there is a great deal to satisfy the mind that this was an ordinance of the city, yet we are compelled to think its admission in this manner erroneous.

Again it is claimed, that even though the city of Washington had power to lease this property, and even if they did do it, they, nevertheless, did not put the defendants into possession and that they, the defendants, acquired title from another source, the city having had notice from the defendants of that fact, and, consequently, there is no liability to the plaintiffs for rent; if this be true, it is a good defence. It ought, therefore, to have been treated as an issue in the case, and the defendants allowed the right to show that they had never entered into occupation under the lease. The law permits that to be made an issue. While the tenant will not be allowed to dispute the landlord's title after he has acknowledged it and entered the premises. Yet if he has never taken possession under that title, or if the estate has never existed which it is claimed was contracted for, the tenant may show it. The court took from the jury the testimony on this point, instead of estimating the proof and advising them as to the force of it, and though we think that the execution of the bond and the presence of these ordinances, consummated a contract between

the parties as to the title to this estate, and while we think and have adjudged, as far as in our opinion it has been necessary in this case, that the title picked up from Pettibone after the initiation of this lease was unavailable to the defendants to justify the withholding of the rent, yet we think that the question was not met as it should have been. Lastly, the court took the case from the jury as to the amount to be recovered, instead of leaving the damages to be estimated by them under the proof, as was their province, and not the court's. This is the uniform rule and practice. The court has power enough over the verdict. If a proper one is not rendered it can be set aside until it is rendered.

Judgment reversed and case remanded for a new trial.

Mr. Justice WYLIE dissented from the conclusion of the court, saying that he thought the verdict did substantial justice between the parties.

THOMAS KNOWLES vs. FRANCES DODGE ET AL.

IN EQUITY. No. 6561.

{ Decided February 7, 1881.

{ The CHIEF JUSTICE and Justices WYLIE and MAC ARTHUR sitting.

1. The effect of the execution by tenant for life of an instrument in writing, in the nature of a last will and testament, disposing of the fee under a general power of appointment, is to change what would otherwise have been but a life estate into an estate of inheritance, and subjects the property appointed to the claims of the creditors of the appointor in preference to the claims of the appointees, and the creditors may file a bill after the death of the appointor to subject the property to the satisfaction of the appointor's debts.
2. If not forbidden by the express terms of the settlement, when a married woman having a separate estate settled upon her for life, with a general power of appointment by last will and testament, executes the power, the appointees are postponed to the claims of creditors for family supplies purchased by the appointor's insolvent husband, with her knowledge and consent, and upon the credit and with the intention to charge her separate estate therewith; and it is not necessary that she should have executed any instrument in writing evidencing her intention to have the estate so charged, it will be sufficient if the purchases were made and the goods supplied upon the credit of her separate estate, and she assented to it.

STATEMENT OF THE CASE.

Frances I. Chapman, being the owner of certain real estate in the city of Georgetown, D. C., and having in contemplation a marriage with Francis Dodge, executed to him on the 22d January, 1852, an ante-nuptial settlement, thereby conveying to Dodge, as her intended husband, all her property, real and personal, to be held by him in trust for her sole and separate use during her life, and "so as that the same, and the income and profits thereof shall not be in anywise liable for the debts or subject to the control or contracts of her said contemplated husband;" and to permit her, or her attorney appointed by writing, to collect and receive the rents and profits, and to dispose of the same as she might see fit, "for her own separate use and benefit." It was also provided that should she by any writing to be executed under her hand and seal, and attested by two witnesses, direct the absolute sale of her real estate, or any part thereof, that then the trustee should sell the same, "and shall collect and get in the proceeds of any such sale or sales, and shall invest the same in his name as trustee of

the said Frances, in such manner as the said Frances may approve and require, and hold the said investments, when made, for the same uses, trusts, and purposes, and with the like power and authority, and subject to the like limitations as are hereinbefore disclosed of and concerning the original trust." The deed further provided as follows: "And it shall and may be lawful for the said Frances, notwithstanding her coverture, by any will or testament to be signed, sealed, and published by her as her will and testament, to give, devise and dispose of her said estate, real and personal, in such manner, to such person or persons, and for such estate or estates as she may see fit." There were other provisions that were to go into effect in case of failure to make appointment, but as an appointment was made, it becomes immaterial to state them.

The marriage was solemnized soon after the execution of this instrument. Children were born and grew up in the family. In course of time, the husband (also trustee) being involved in financial difficulties, became unable to provide for the maintenance of the family. Under these circumstances he was in the habit of purchasing from the plaintiff, Knowles, who was a grocer, such supplies as were suitable for and needed by the family. These supplies, which were consumed by the family, were obtained, it was claimed by the plaintiff, on the credit of the wife's separate estate, and with her knowledge and consent. They were charged to the wife and not to the husband; the plaintiff refusing to credit him on account of his known insolvency. From time to time promissory notes were at the request of the wife, and with her knowledge and approval, given for these supplies. These notes were made to the order of the plaintiff and signed "F. Dodge, trustee of F. I. Dodge." And among the proofs was a letter of the husband addressed to the plaintiff, in which it was stated that as soon as the condition of Mrs. Dodge (who was then in failing health) would admit she would execute to the plaintiff such an instrument as would make him secure. Before the formal execution and delivery of this instrument Mrs. Dodge died. By her last

will and under the general power of appointment reserved in the ante-nuptial settlement, devises and bequests of all her estate were made to two of the children of the marriage, no provision being made for the payment of her debts. At the time of the death of Mrs. Dodge, the plaintiff held the notes signed as above, and also an open account against her estate. Whereupon plaintiff, for himself and other creditors, filed this bill seeking to make the estate liable in the hands of the devisees for debts alleged to have been contracted by Mrs. Dodge during her lifetime.

The answer denied that the alleged debts were incurred in reference to the separate estate of Mrs. Dodge, and that the marriage settlement did not empower her to charge said estate with her separate debts.

On the hearing in special term the bill was dismissed.

CHARLES M. MATTHEWS for appellant :

The estate devised by the deceased, Frances I. Dodge, is liable to the payment of plaintiff's claim for the following reasons:

1. The debt was contracted by her duly authorised agent. *Coal Co. vs. Dyett*, 7 Paige, 16 ; *Shaffer vs. Lehman*, 2 Mac A., 305; *Vorhees vs. Bonesteel*, 16 Wall., 31.

2. It was contracted with reference to her separate estate, upon its faith and credit, and for her benefit. The signature to the notes made by the trustee of her real estate indicates her intention to charge it, although the mode prescribed in the settlement was not adopted, other modes not being, however, forbidden. 20 Wend , 570; 7 Paige, 9; *Ib.*, 116; 37 Conn., 319; 41 *Ib.*, 557; 43 *Ib.*, 571; 4 Allen, 349; 103 Mass., 561; 20 N. J. Eq., 119; 26 *Ib.*, 507; 7 H. & J., 317; 1 M. C. D., 215, 218; 16 Md., 554; 46 Md., 356; 30 Ohio St., 170; *Rich vs. Hyatt*, 7 Wash. Law Rep., 104.

3. The fact that it was contracted for necessaries does not impair the liability of the estate. Her husband was insolvent and could not provide them. 3 Camp., 22; 5 Taunt., 356, (E. C. L., 187); 9 Car. & Payne, 643; 3 Mylne & K., 209; 2 Sandf., 283; 2 Wend., 454; 55 N. Y., 240; 36 N. Y., 603; 26

N. Y., 450; 8 N. Y. s. c., 128; 64 N. Y., 219; 40 Conn., 463, 12 G. & J., 239; 37 Md., 521; 20 Ohio St., 378; 59 Ib., 520; 76 Ill., 528; 61 N. H., 315; 47 Mo., 504; 5 Cr. C.C., 644; 1 Peters, 106.

4. She could encumber her estate for her husband's debts, had credit been extended to him by plaintiff. 18 Md., 305; 37 Md., 521; 25 Grat., 481; 22 Wall., 337; 2 Mac A., 291.

5. Having under the settlement a general power of appointment and having exercised it by will, the estate is charged in the hands of the devisees, with her debts; this under the general doctrine of powers. 2 Jarman, 546; 2 Sugd. Powers, 28; 1 Atk., 465; 2 Ib., 172; 3 Ib., 269, 410, 656; 2 Vern., 285, 316, 464; 2 Ves. Sr., 10; 2 Freem., 264; 7 Ves., 499; 12 Ib., 206; 6 Madd., 265; 5 Simons, 562; 3 D. F. & J., 494; 4 Privy Council, 572; 3 L. R., (Ch. Div.), 593; 15 N. H., 298.

6. The estate in the hands of her devisees is liable under the statute of 3 W. and M., ch. 14, sec. 1, as affected by that of 5 Geo. II, ch. 7, sec. 4, both now operative in the District of Columbia. 2 Bl., 225, 317; Alex. Br. Stat., 576, 716; 1 P. W., 99; 3 Bl., 28; Ib., 284; 2 Atk., 125; 2 Atk., 204; 2 Bro. C. C., 614; 2 Cr. C. C., 407.

7. The estate is liable under the Maryland act of 1785, ch. 72, sec. 5, and its supplements. 1 H. & J., 469; 2 Bl., 827.

Messrs. GORDON & GORDON for appellees :

1. Where a settlement is made in trust for a wife, with power to sell and convey absolutely, and the proceeds re-invest, such re-investment to be considered as the original estate, and after her death in trust for such person as she may by will direct, the principal of her estate cannot be charged with her debts. 4 Md. Ch., 68; Eq. Cas., 2 Law Rep., 180; 2 Wharton, 11; 11 Md. 492; Tyler on Coverture, §311; 2 H. & G., 85; 5 Md., 235.

2. To bind the separate estate of a married woman there must be conclusive evidence that it was her intention to bind her separate estate, and the intention to do so must be disclosed in the very contract which is the foundation of the charge. 22 N. Y., 450; Eq. Cas., 2 Law Rep., 180; 16 Md., 549; 1 Md. Ch., 212.

Mr. Justice WYLIE delivered the opinion of the court:

In 1852, Frances I. Chapman, a young lady, was owner of certain property about Georgetown, D. C., in her own right. In contemplation of marriage with the defendant, Dodge, she made a deed conveying all her property to her expected husband, as trustee for her sole and separate use. The marriage took place; children were born; but the husband being insolvent, failed to support them. Knowles, the plaintiff, was a grocer, and furnished supplies from time to time for the support of the family. The husband would make these purchases as agent, or, as he called himself, the trustee of his wife, and in that capacity he signed a number of notes in settlement of bills which had been contracted. All these supplies were for the use of the family. They were all charged by Knowles against Mrs. Dodge. They were not furnished on the credit of the husband, for he had none; he was notoriously insolvent, with no prospect of ever being solvent. The family would have perished, or, at least been obliged to separate if some person had not furnished them supplies. They were indispensable, and there was no way to obtain them except upon the wife's credit. The wife was aware that Knowles was furnishing and supplying the family. She assented to the purchases, and the proof is that she intended to execute a formal instrument making these claims a charge upon her separate property. But her health was declining, and she died before it was done. And now this is a bill in equity brought by Knowles against the parties claiming the property through an appointment which was made by Mrs. Dodge to secure payment of the debt out of the separate estate, and the question to be determined by the court is whether the separate estate is liable under the circumstances. In order to ascertain this we must look at the deed of settlement, as by that we are to be controlled in all cases of this kind. This deed after giving the names of the parties, declares: [Here his honor read the deed, the material parts of which are given in the statement of the case.] Here then we have an estate, real and personal, con-

veyed by a wife before her marriage and in contemplation of marriage, to her husband, as trustee, to allow her to receive the rents and profits during her life, and conferring upon her the power of appointing by will the disposal of the remainder of the estate after the life estate should terminate. There were provisions as to new investments, and as to what was to be done in case she failed to make an appointment or make a will, but it is not worth while to examine them, for the reason that there were no investments made, and because she made her will and made her appointment.

The first question presenting itself in the case is, what is the effect of the execution by a tenant for life, under these circumstances, of an instrument in the nature of a last will and testament making appointment under a power? It was in her option to execute the power conferred upon her by the settlement, or not to execute it. If she had failed to make the appointment, then subsequent provisions in the settlement as to the distribution of the property would take effect. But what effect does the execution of her power of appointment have? Does it subject that property to the payment of her debts or not? Her life estate is at an end, of course. Under the instrument of settlement she had the power of appointment, and she has exercised it in favor of her children.

Assuming that Knowles has a valid claim against the wife, do the children take this property subject to her debts? Or do they take it discharged of such obligation? Now, if Mrs. Dodge had failed to execute the power of appointment, there would have been no doubt about it. The creditor would have lost his claim, because that would have been an indication that she had elected to claim for herself nothing more than a life estate. But having availed herself of that power, the question is whether it does not bring the whole estate under obligations, and we think it does.

There are many authorities upon this subject, but I shall read merely from Williams on Executors, vol. 2, page 1522, (5th Am. ed.), where they can all be found, and they fully sustain the doctrine there enunciated:

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“Where a man has a general power of appointment over a fund, and actually exercises this power, whether by deed or will, the property appointed shall form part of his assets, so as to be subject to the demands of his creditors at his death, in preference to the claims of his legatees or appointees.”

The execution of the power of appointment changes what would otherwise have been nothing but a life estate into an estate of inheritance, and renders it subject to the debts of the appointor. This then was an estate of inheritance, and the devisees under the will are to be postponed to the claims of the creditors.

The only remaining question is, whether the facts in this case establish the validity of the claim of Knowles.

There are, I may say, thousands of authorities in the books in regard to the power a married woman has to make a charge upon her separate estate. There is no doubt now that she has the power to make such a charge by a properly-executed instrument, and some of the courts say that that is the only way to do it. The court of appeals of Kentucky, in *Burch v. Breckenridge*, 16 B. Monroe, 384, has taken that ground, that she undoubtedly has the power to charge her estate with the debts of her husband, or with the necessities furnished to the family; but that, as it is a charge upon her estate, it must be by some instrument in writing. We think, however, that is not now the prevailing doctrine.

In England the doctrine which has obtained, after a long struggle, is laid down by Lord Brougham in *Murray v. Barlee*, 3 My. & K., 209, followed by *Owens v. Dickenson*, 1 Cr. & Ph., 53, and *Master v. Fuller*, 4 Bro. C. C., 19.

In that case the Lord Chancellor, after reviewing all the cases, expresses his opinion thus:

“In all these cases I take the foundation of the doctrine to be this: The wife has a separate estate, subject to her own control, and exempt from all other interference. If she cannot affect it, no one can; and the very object of the settlement which vests it in her exclusively, is to enable her to deal with it as if she were *discovert*. The power to affect it being unquestionable, the only doubt that can arise is, whether

or not she has validly encumbered it. At first, the court seems to have supposed that nothing could touch it but some real charge, as a mortgage, or an instrument amounting to an execution of a power, where that view was supported by the nature of the settlement. But afterwards her intention was more regarded, and the court only required to be satisfied that she intended to deal with her separate property. When she appeared to have done so, the court held her to have charged it, and made the trustees answer the demand thus created against it. A good deal of the nicety that attends the doctrine of powers thus came to be imported into this consideration of the subject. If the wife did any act directly charging the separate estate no doubt could exist ; just as an instrument expressing to be in execution of a power was always of course considered as made in execution of it. But so, if by any reference to the estate, it could be gathered that such was her intent, the same conclusion followed. Thus, if she only executed a bond, or made a note, or accepted a bill, because those acts would have been nugatory if done by a *feme covert* without any reference to her separate estate, it was held in the cases I have above cited, that she must be intended to have designed a charge on that estate, since in no other way could the instrument thus made by her have any validity or operation; in the same manner as an instrument which can mean nothing if it means not to execute a power, has been held to be made in execution of that power, though no direct reference is made to the power. Such is the principle, and it goes the full length of the present case. But doubts have been in one or two instances expressed as to the effect of any dealing whereby a general engagement only is raised. That is, where she becomes indebted without executing any written instrument at all. This point was discussed in *Greatly vs. Noble*, 3 Madd., 79; and the Master of the Rolls (Sir John Leach) appears in the subsequent case of *Stuart vs. Kirkwall*, 3 Madd., 387, to have been of opinion that the wife's separate estate was not liable without a charge, and to have supposed that he had before stated that opinion in *Greatley vs. Noble*, though he by no

means expressed himself so strongly in disposing of that case, and distinctly abstained from deciding the point. I own I can perceive no reason for drawing any such distinction. If in respect of her separate estate the wife is in equity taken as a *feme sole*, and can charge it by instruments absolutely void at law, can there be any reason for holding that her liability, or, more properly, her power of affecting the separate estate, shall only be exercised by a written instrument? Are we entitled to invent a rule, to add a new chapter to the Statute of Frauds, and to require writing where that act requires none? Is there any equity reaching written dealings with the property, which extends not also to dealing in other ways, as by sale and delivery of goods? Shall necessary supplies for her maintenance not touch the estate, and yet money furnished to squander away at play be a charge on it if fortified by a scrap of writing? No such distinction can be taken upon any conceivable principle. But one of the earlier cases, *Kange vs. Delavall*, 1 Vern., 326, makes no mention of such a distinction, for there being indebted generally is all that is stated as grounding the claim; and in *Lillio vs. Airey*, 1 Vesey, jr., 227, the party who had furnished necessary supplies to the wife, was held entitled to recover to the extent of her separate maintenance. She had, it is true, given a bond, but only for £60; the court, however, held the creditor entitled to a larger sum, the separate maintenance exceeding the amount of the bond."

In the leading case of *Hulme vs. Tenant*, 1 Bro. C. C., 16, to which all the other cases refer, decided by Lord Thurlow, he held that the wife's estate should be liable for a debt of the husband which she had promised to pay; but that the execution should not reach beyond her rents and profits in the hands of the trustee. But that case is different from this. There there was a power of appointment in the deed of settlement, to be sure, but the woman was alive. The deed of settlement was for the rents and profits for her sole and separate use during her natural life, as in this case, and, *non constat*, she had never exercised the power to appoint, and the relief, therefore, so far as to be effectual under the

decree, must be confined to the rents and profits in the hands of the trustee during her life. But this is a different case.

In the seventh edition of Lord St. Leonard's work on "Powers," his lordship observes, without referring to *Murray vs. Barlee*, or *Owens vs. Dickenson*, "that the prevailing opinion then was, that her separate estate was not liable to general demands upon her. Considering, however, the opinions I have referred to, and the reason of the thing, I think it very probable that when that question arises for decision, it will be decided in the affirmative." Per Sir R. T. Kindersley, V. C., in *Vaughan vs. Vanderstegen*, 2 Drew., 183.

It is only consistent with all the analogies on the subject, that, if a wife upon whom a separate estate for her own use has been settled, allows her husband to receive the rents and profits, she will be bound by it without making any assignment or transfer to him. He takes them and takes them for the support of the family, or for himself, or other uses, and that is taken as an appropriation in that way.

In this case Mrs. Dodge's death has taken place. I read again from this work :

"After the death of a *feme covert* having separate property, creditors may file a bill for payment of their debts (*Owens vs. Dickenson*, 1 Cr. & P. H., 48; *Gregory vs. Lockyer*, 6 Madd., 90); and her specialty debts, as debts by bond, will not have priority over her simple contract debts, but must both be paid, *pari passu*. Anon., 18 Ves., 258; *Owens vs. Dickenson*, 1 Cr. & P. H., 53. In other respects, if she has left a will, her estate will be administered according to the ordinary rules in creditor's suits. *Owens vs. Dickenson*, 1 Cr. & P. H., 50; *Norton vs. Turvill*, 2 P. Wms., 144. The separate estate of a married woman is liable for a breach of trust by her."

I think that this point has been determined also in the case of *Jacques vs. The Methodist Episcopal Church*, the most famous case that has ever arisen in this country in regard to these interesting questions. It was decided in the first instance by Chancellor Kent. An appeal was taken

to the Court of Errors in New York, and the decision was reversed. The opinion of the Court of Errors was pronounced by Chief Justice Spencer, whose name amongst lawyers is almost of equal authority with that of the great chancellor himself. Without enumerating the facts in this case, I will read one paragraph from the opinion of the chief justice in 17th Johnson's Reports, 580:

"It necessarily results from the power which I suppose Mrs. Jacques to have had over her property, that she might give it away without any formal act, in the same manner as though she had been sole; and her agreement that the family expenses were to be borne out of her estate, especially when executed by her, was a valid act. She was well situated as regards property, while her husband was in quite moderate circumstances. She chose, after marriage, to maintain her former equipage, and the husband acquiesced in her wishes. It would be extremely hard and unjust to throw upon him the charge of her establishment, when it is clear that she meant to defray the expense of it herself. My opinion, accordingly, is, that the agreement is valid, and that the husband is not only not to be charged with any sums of money expended for the maintenance of the family, but that he is to be allowed for all advances for that object; and also for money advanced for necessary reparations to her estate."

There were charges that were made against her, and they were large charges, for which she had executed no instrument at all to bind her separate estate. Whatever we may think individually of this great controversy between Chancellor Kent, on the one side, and the Court of Errors in New York, on the other, the doctrine which was announced by the Court of Errors has prevailed in New York, and, with some exceptions, I think, throughout this country generally. And the Supreme Court of the United States, in *Stephens vs. Beall*, 22 Wall., 337, a case which went up from this court, has gone very far in the direction previously marked out by the Court of Errors in New York. They have refused to follow the doctrine laid down by Chancellor Kent.

The doctrine maintained now in New York, and generally

in this country, and the doctrine which has been recognized and enforced by the Supreme Court of the United States in *Stephens vs. Beall*, is this: That where an estate is settled upon a married woman for her own sole and separate use she is the only person to dispose of that estate. Her husband cannot do anything with it. The object of that settlement is to bind his hands with fetters, and to leave her free as a *feme sole*. She can do with her separate estate whatever she chooses, unless by the deed of settlement her hands are bound. But so far as her hands are unbound, she is at liberty to act as a *feme sole*, or any other person. And even when this deed of settlement requires that her charge upon the estate shall be made by deed, she may make the charge by will and by reversion. If the title is complete in her, she can charge and encumber it with everything which she is not forbidden. If she can charge the estate in that way, she may contract debts in regard to the estate. Then it becomes a question of fact to be determined by every court, in each case, according to its circumstances, to whom the credit was given. If the credit was given to the married woman and she assented to it, if the purchases were made and the goods supplied to her, good faith requires that her estate shall answer for it. It would be a fraud on her part to allow her to repudiate a debt which she herself had contracted in this way, for the maintenance of her otherwise helpless family and herself. And we think that, in reaching this conclusion, we have not gone beyond the authorities which now prevail generally in regard to this question. These views lead us inevitably to a reversal of the decree below.

CATHERINE DIXON vs. B. & B. R. R. Co.

RHODA O'BRIEN vs. SAME.

JOHN SPRINGMAN vs. SAME.

WILLIAM H. WEST vs. SAME.

AT LAW. Nos. 20,577, 20,579, 20,580, and 20,581, CONSOLIDATED.

{ Decided March 2, 1881.

{ The CHIEF JUSTICE and Justices WYLIE and HAGNER sitting.

1. The inquisition provided for by the act of Congress of May 21, 1872, granting the B. & P. R. R. Co., the right to lay its tracks along Sixth street in the city of Washington, was for a different purpose from that specified in the act of February 5, 1867, authorizing the extension of a lateral branch of that road into the District of Columbia. That of the act of 1867 applied to cases where the company desired to locate its road over any land within the District, and in the event of a failure to obtain the assent of the owner for any of the reasons set forth in the act, the company was to make application to a justice of the peace for the county of Washington, who thereupon was to issue his warrant to the marshal requiring him to summon a jury to meet on the land and proceed to value the damages which the owner would sustain by its use or occupation by the company. But the damages to be ascertained under the authority of the act of 1872, viz., "the appreciation or depreciation of the value of the property situated along said street," was a matter not provided for by the act of 1867, and although the act of 1872 declared that the amount which the company should pay should be ascertained in the *manner and form* as provided by the act of 1867, this simply referred to the inquisition as a convenient method of ascertaining the damage, and did not mean that the inauguration of the proceeding was to rest only in the pleasure of the company.
2. The statute of limitations does not bar the remedy where the liability of the defendants is created not merely by the act of the parties, but by the positive provisions of a statute, nor will it be held to embrace any proceeding at law not therein enumerated. Hence as the Maryland act of 1715, chap. 23, sec. 2, which is the statute of limitations in this District, in none of its provisions, makes allusion to a proceeding by inquisition, such a proceeding cannot be regarded as an action within the meaning of the statute.
3. In an action at law to recover damages to the plaintiff's property by reason of the laying of a railroad track, the only recovery which can be had would be in respect of temporary or transitory damages accrued up to the time of the inception of the suit, whereas, a statutory inquisition, which is not a suit in the sense of the law, is instituted to ascertain for all time the amount of permanent damages sustained. But a proper subject for consideration by the jury on the inquisition would be the recovery which might be had in a pending action at law, by way of reducing the amount of their award.
4. At such an inquisition if the marshal submits the names of the jurors, to the respective attorneys, that they may strike from the list until the number is reduced to twelve, and the attorney for the defendant refuses to do so, the marshal may perform that duty in his stead, as otherwise it would be possible in any case for a party defendant to prevent the rendition of a verdict by refusing to strike from the panel.

5. There is no force in an objection that in four separate inquisitions, the same twenty jurors were presented as a panel in each case.
6. Nor will the court consider the objections whether a sufficient number of witnesses were sworn and examined as to the amount of the alleged damages.
7. A party is not entitled to recover damages for the depreciation of his property in consequence of the laying of a railroad track, if the property was not owned by him at the time the track was laid. The owner of the land at the time of the injury can alone take advantage of a claim for damages, and if he does not claim, his subsequent vendee cannot.

THE CASE is stated in the opinion.

J. G. PAYNE for plaintiffs.

ENOCH TOTTEN for defendants.

Mr. Justice HAGNER delivered the opinion of the court.

On the 27th of February, 1879, on application of the several plaintiffs, a justice of the peace issued warrants, directed to the marshal of the District of Columbia, requiring him to summon in each case a jury of twenty citizens to assemble on the premises and assess the damages sustained by the plaintiffs, respectively, in consequence of the laying of the defendant's railroad track along Sixth street. The marshal summoned the same twenty persons to appear in each case. The jury appeared at the time named, and the list of names was submitted by the marshal to the respective attorneys that they might strike from the list. The attorney for the railroad company objected to the proceeding as entirely illegal and unauthorized, and refused, in behalf of the company, to strike any names from the list submitted. Thereupon, the counsel for the plaintiffs in the respective cases, struck off four names, and the marshal proceeded to strike a sufficient number of additional names to reduce the number to twelve. The same proceeding was adopted in each of the four cases in turn, and the jury rendered verdicts in each case in favor of the plaintiff therein, assessing the damages in different amounts.

On the 17th of March, 1879, the marshal made his return in each case to the court. The defendant filed exceptions in each case, and these exceptions have been certified to this court for determination in the first instance.

First. It is insisted upon the part of the railroad company that the magistrate was without jurisdiction to issue a warrant in either case, upon the application of *the plaintiff*, as the statute under which he professed to act provided only for the issuing of such warrant *upon the application and request of the railroad company.*

The second section of the act of Congress of the 5th of February, 1867, authorizing the extension, &c., of a lateral branch of the Baltimore and Potomac Railroad into and within the District of Columbia, provided that, before the railroad company shall proceed to construct any railroad which they may lay out or locate over any land, &c., within the District, they shall first obtain the assent of the owner of such land, &c., "or if such owner shall be absent from said District, *or shall refuse to give such assent* on such terms as said company shall approve, or because of infancy, coverture, &c., shall be legally incapable of giving such assent, then it shall be lawful *for the said company* to apply to a justice of the peace for the County of Washington, who shall thereupon issue his warrant directed to the marshal requiring him to summon a jury which should meet on the land and "proceed to value the damages which the owner of such land will sustain by *the use or occupation* of the same required by the said company."

The act of the 21st of May, 1872 (entitled, "An act to confirm the action of the board of aldermen and common council of the City of Washington, designating a depot site for the Baltimore and Potomac Railroad Company, and for other purposes"), declared that "the Baltimore and Potomac Railroad Company shall have the right to extend its track from Virginia avenue along Sixth street to the open grounds between Sixth street and B street north, and the canal, described as follows :"

* * * "The said company shall lay no more than two tracks along said Sixth street, and as near as practicable in the centre of said street : *Provided*, That the said company shall pay the owners of private property along the line of Sixth street, north of Virginia avenue by which the said

railroad passes, any damage which the said property may sustain by reason of the laying of its track along the said Sixth street, and the said damages, if any, shall be ascertained *in manner and form* as provided by the act of Congress approved February 5, 1867, &c., it being understood that the question of damages herein referred to shall be confined to the question of appreciation and depreciation of the value of the property situated along said street."

The condemnation provided for in the act of 1867 applied to cases where the railroad desired to obtain permission *to lay out or locate its road over any land* within the District, and failed *to obtain the assent* of the owner of such land, for any of the reasons therein set forth; in that case the company was to make the application to a justice of the peace. But that proceeding was not to be resorted to by the company *where the owner had already given his consent*.

By the act of 1872, the United States, the owner of Sixth street, expressly gave its consent to the location by the railroad company of its track along that street from Virginia avenue to B street. No inquisition, therefore, was necessary at the instance of the company, or of any one else, to obtain the assent thus already given for the laying of the track. But the act declared that the amount which the company should pay to the owners of private property along Sixth street, *for any damage* which said property might sustain by reason of the laying of the track along Sixth street, should be ascertained *in manner and form* as provided by the act of Congress of February 5, 1867.

The inquiry thus authorized to be instituted was for a different purpose from that specified in the original law; although the form of an inquisition was adopted as a convenient mode of ascertaining the amount the company should pay on account of "the depreciation of the value of the property situated along said street."

It was certain that the only party who could complain of such damage would be the owner of the property, and that the company would never make application to inaugurate proceedings to cause itself to be mulcted in damages. The

act of 1872 nevertheless plainly contemplated such proceedings, and it cannot be concluded, by any fair construction, that the inauguration of the proceedings by inquisition was to rest only upon the pleasure of the company. Such a construction would practically nullify all benefit that the owners of property could claim under the law.

We think the Supreme Court of the United States, in *Baltimore and Potomac Railroad Company vs. The Trustees of the Sixth Presbyterian Church*, 1 Otto, 127, recognized the right of an owner of private property to proceed by inquisition under the act of 1872. In that case compensation was claimed by the trustees of the church against this company for the damage resulting to the church property from the laying of the tracks, and the magistrate, *upon the application of the trustees*, issued the warrant under which judgment was given in favor of the church. After full argument, in which a number of objections were interposed on behalf of the company, the award was affirmed by the Supreme Court; which could not have been the case if the court had been of opinion that the whole proceeding was void, because not inaugurated by the company.

Second. It is insisted on behalf of the railroad company that inasmuch as the company had completed the laying of its tracks along Sixth street about the 1st of July, 1872, and these warrants were issued nearly seven years after that date, the proceeding is barred by the statute of limitations.

The statute of limitations in force in this District, which is the Maryland act of 1715, chapter 23, section 2, declares that "all actions of trespass *quare clausum fregit*, all actions of trespass, detinue, sur-trover, or replevin for carrying away goods or chattels, all actions of account, contract, debt, book, or upon the case, other than such accounts as concern the trade or merchandise between merchants and merchants, their factors and servants, which are not residents within this province, all actions of debt for lending, or contract without specialty, all actions of debt for arrearages of rent, all actions, of assault, menaces, battery, wounding and imprisonment, or any of them, which shall be sued or brought by any person

or persons within this province, at any time after the end of this present session of assembly, shall be commenced or sued within the time of limitation hereafter expressed, and not after; that is to say, the said actions of account and the said actions upon the case, upon simple contract, book, debt, or account, and the said actions for debt, detinue, and replevin for goods and chattels, and the said action for trespass *quare clausum fregit*, within three years ensuing the cause of such action and not after, and the said actions on the case for words, and actions of trespass, of assault, battery, wounding and imprisonment, or any of them, within one year from the time of the cause of such action accruing, and not after."

By section 6 it is declared that "no bill, bond, judgment, recognizance, statute merchant, or of the staple, or other specialty whatsoever, except such as shall be taken in the name of our sovereign lord, the king, his heirs and successors, shall be good and pleadable or admitted in evidence against any person or persons in this province after the principal debtor and creditor have been both dead twelve years, or the debt or thing in action above twelve years standing," &c.

The right to recover damages for the depreciation of the plaintiff's property by the inquisition arises solely under the statute of 1872, and it is well settled that where the liability of a defendant is created, not merely by the act of the parties, but by the positive provisions of a statute, the plaintiff's remedy is not barred by the statute of limitations. Angel on Limitations, sec. 8, p. 80.

It is equally well settled that the statute of limitations will not be held to embrace any proceedings at law not therein enumerated. But in none of the provisions of our statute is allusion made to a proceeding by inquisition. The statute, in words, applies to "all actions of trespass," &c., and declares that *said actions* shall be brought within the designated periods. The proceeding by inquisition cannot be regarded as an action within the meaning of the statute. It has been held that limitations is not a bar to proceedings by

way of distress for rent. *Longwell vs. Ridinger*, 1 Gill, 57. Nor to a suit against a sheriff for an escape. *French vs. O'Neal*, 2 Harris & McHenry, 401. Nor to a suit against a sheriff for a false return to a *fieri facias*. *Newcomer vs. Keedy*, 2 Md., 19. Nor to a distress for taxes. *Hogan vs. Ingle*, 2 Cranch Cir. Ct. Rep., 354. So debt on an indenture reserving rent, is not within the statute. *Angel on Limitations*, sec. 87.

These decisions proceed upon the theory that the statute of limitations will not be extended to cases not expressly within its provisions.

In this case it was in the power of the railroad company itself to have insured the commencement of the proceeding within the three years. But having, during all this interval, availed itself of the grant and neglected any offer of compensation to the parties aggrieved, and taken no steps to expedite an examination of the extent of the injury, it cannot be permitted to avail itself of the delay for which the company itself may be justly held accountable. *United States v. Clark*, 96 U. S., 43.

Third. It is objected that actions at law in behalf of these plaintiffs against this defendant are pending and undecided on the law side of this court, in respect of the identical matters and things complained of and set forth in these proceedings. If we are at liberty to consider the matters alleged in this exception as admitted, it is enough to say that the only recovery which could be had in those suits by the plaintiff would be in respect of temporary or transitory damages accrued up to the time of the inception of those actions; whereas this proceeding, which is not a suit in the sense of the law, is instituted to ascertain for all time the amount of permanent damage sustained by the plaintiffs. Whatever recovery might be had in those cases would be a proper subject for consideration by the jury on the inquisition, by way of reducing the amount of their award.

Fourth. We are of opinion that the action of the marshal in striking names from the panel on the refusal of the defendants' attorney to perform this duty was perfectly

proper. Unless this was so, it would be possible in any case for a party defendant to frustrate justice and prevent the rendition of a verdict by refusing to strike from the panel.

Fifth. There is no force in the objection that the same twenty jurors were presented as a panel in each case. The same panel serves at a long term of the court where a hundred cases may be tried. Practically the jury in each separate trial, however, is a distinct one.

Sixth. On its face the proceedings in each of these cases are regular, and the presumption of course would be that the jury acted properly. We cannot, therefore, consider the objections as to whether a sufficient number of witnesses were sworn or examined as to the amount of the alleged injuries.

Seventh. These are all the exceptions which are common to all the cases; but in the case of Springman another objection is interposed which we think is well founded. It appears that at the time the track was laid the property now owned by Springman belonged to other persons, and was conveyed to him subsequently. In our opinion he is not entitled to recover damages for the depreciation of the property by the laying of the track; both upon principle and authority.

In Mills on Eminent Domain, chap. 8, sec. 66, the author says: "A claim of damages and a title to land may be distinct. Damages for taking and injury to land belong to the owner *at the time of the injury*, and do not pass to a subsequent vendee. The owner alone can take advantage of a claim for damages, and if he does not claim, his subsequent vendee cannot."

In 11 Richardson's South Carolina Reports, 91, *Lewis vs. Wilmington and Manchester Railroad Company*, it is said: "The right to claim compensation from the railroad for land taken from the track of their road belongs to the owner of the track at the time the road was finished through it, or to his legal representatives, and not to a vendee who purchased the track from the owner after the road was finished though it."

So in 26 Vermont, 670, *Rand vs. The Town of Townshend*, where an owner of land brought an action against the township for the value of land condemned for the road. It appeared that the road was not ready for use or open to the public at the time the claimant purchased the land, although it had been laid down before his purchase. The court say: "We think the owner of the land at the time the road is laid out is the person, and the only person to bring this petition." See also 1 Redfield on R. R., 350, 376.

It is but fair to presume that Springman, at the time of the purchase, took into consideration the depreciation which had taken place in the value of the property in consequence of the laying of the track, and that he obtained the property for a lower price in consequence of this depreciation.

It would be, therefore, inequitable that he should be allowed for that a second time by an award in his favor on this inquisition.

It results from these views that this exception in Springman's case is ruled good and those in the three other cases are overruled and the awards as to them affirmed.

TALBOT C. MURRAY vs. WILSON AGER ET AL.

IN EQUITY. No. 6545.

{ Decided March 2, 1881.
} The CHIEF JUSTICE and Justices WYLIE and HAGNER sitting.

A court of equity may direct the sale of the interest of an inventor in his patent, in order to satisfy a judgment obtained against him in a court of law, (the writ of execution having been returned *nulla bona*;) and for that purpose will require the patentee to make an assignment of the patent as provided in section 4898 of the Revised Statutes of the United States, and in the event of the refusal of the patentee to do so, will appoint a trustee with authority to execute the same.

THE CASE is stated in the opinion.

HINE & THOMAS, for plaintiff, cited 14 How., 528.

T. T. CRITTENDEN and WARRICK MARTIN, for defendants, cited *Vaughan vs. Northrup*, 15 Pet., 1; *Stevens vs. Glading*, 17 How., 451; *Cooper vs. Gunn*; 4 B. Monroe, 596; *Swain vs. Guild*, 1 Gall., 497; *Ashcroft vs. Walworth*, 1 Holmes, 152; *Gozler vs. Wilder*, 10 How., 477; *Miller vs. Taylor*, 4 Burrows, 2303. As to the case of *Stevens vs. Cady*, 14 How., 528, cited by plaintiffs to sustain their bill, the question before the court was not whether a court of equity could decree a seizure and sale of a patent right to pay a judgment at law. No such question being before the court, no such question was decided. The question was whether the seizure and sale of the plates for a map, carried with it the right to print and publish that map. The court decided this in the negative.

Mr. Justice HAGNER delivered the opinion of the court.

The bill in this case, filed by Talbot C. Murray, alleges the recovery by him of a judgment on the law side of this court against the defendant Wilson Ager and others for \$2,164.66; that an execution was issued upon the judgment, which was returned *nulla bona* by the marshal; that the defendant, Wilson Ager, is the inventor and owner of certain inventions secured to him by letters-patent from the United States, which are described in the bill, "for improvement in machines and processes for decorticating grain;" that the

complainant is without any means of realizing his judgment, except by the subjection of the patent right to its payment, and it prays that the rights of the patentee may be sold under the decree of the court and the proceeds applied to the payment of the judgment; that an injunction may be granted to restrain the defendant Wilson Ager from selling or assigning the patents during the pendency of the suit; and that after sale has been made he may be compelled to execute such assignment of the patents to the purchaser as may be necessary to vest the title in conformity with the patent laws of the United States, or in the event of his failure to do so, that a trustee may be appointed to execute the assignments.

The defendant's answer admits the rendition of the judgment, the return of the execution unsatisfied, and that he is the owner of the patent rights described in the bill; but he claims that these are not subject to seizure and sale under the proceedings instituted by the complainant.

The court below passed a decree dismissing the bill, and the complainant appealed to this court.

The question involved in the case is one of great interest and of novelty, so far as we have been able to discover.

It is insisted upon the part of the patentee that the rights secured to him by his patent cannot be made the subject of sale by any process at law, or in equity, against his consent.

The Constitution, by Article I, section 8, declares that Congress shall have power to promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries. In conformity with this provision a careful system of laws has been devised regulating the issue of patents and directing the mode in which they may be assigned. Section 4898 of the Revised Statutes declares that every such patent, or interest therein, shall be assignable in law by an instrument in writing, and that such assignment or conveyance shall be void as against any subsequent purchaser or mortgagee, for valuable consideration without notice, unless recorded in the Patent Office within three

months from its date. Section 4896 prescribes the mode in which a patent may be issued to an executor or administrator of an inventor, in trust for his heirs-at-law, or devisees, in case of the death of the patentee before the issue of the patent, and declares that the patent shall be enjoyed by his representatives, or devisees, in as full manner and on the same terms and conditions as it might have been enjoyed by the original patentee. Similar provisions exist in the statutes with reference to copyrights, which are declared to be assignable by an instrument in a prescribed form to be recorded in the office of the Librarian of Congress.

It is contended upon the part of the patentee that it is well settled upon authority that the patent right in the hand of the inventor cannot be made the subject of sale under an execution at law, and the case in 14 Howard, 528, *Stevens vs. Cady*, is relied upon as establishing this proposition. It is to be observed that the case refers to a copyright and not to a patent right, and although it is intimated in the case of *Stevens vs. Gladding*, in 17 Howard, 454, that there is no common law copyright in this country, it is well settled that there existed at the common law a marked distinction between the rights of an author to his writings and those of an inventor in his invention. The authorities declared that, independent of statute, or of grant from the government, an author had a right to the exclusive publication of his writings, while no such exclusive right existed, independent of statute, in an inventor; and that no action could be maintained by an inventor before the grant of a patent, for the unauthorized use of the invention. *Gaylor vs. Wilder*, 10 Howard. 477, "An inventor, in fact," says an approved authority, "does not create, but only invents or finds out something which had a prior existence, although unknown to the world, in precisely the same way that persons make discoveries in geography and astronomy. If Milton had not written *Paradise Lost*, it is extremely improbable that it would ever have been written at all. But if Watt had never published his invention, it would most probably have been discovered long ere now,

that a condensing steam engine is worked with more economy when the steam is condensed in a separate vessel, and not in the cylinder." Hindmarsh on Patents, 228.

But conceding that patent rights and copyrights stand on the same footing, let us examine how the decision in 14 Howard controls the present inquiry. The facts of that case are, that the complainant took out a copyright of a map of the State of Rhode Island ; that while engaged in publishing the map, by virtue of the copyright, a judgment was recovered against him by a creditor, execution issued, and the copper plate upon which the map was engraved was seized and sold by the sheriff to the defendant, who thereupon proceeded to strike from the plate copies of the map ; and the prayer of the bill was that an injunction might be granted to restrain its printing and publishing in violation of the complainant's copyright.

"The single question in the case," say the court, "is whether or not the property acquired by the defendant in the copper plate, at the sheriff's sale, carried with it, as an incident, the right to print and publish the map engraved upon its face." The Supreme Court decide that all that was sold by the sheriff was the piece of copper upon which the map was engraved ; that the sheriff did not attempt to sell, and had no right to sell, under the execution, the copyright. "The copyright is the exclusive right to the multiplication of the copies for the benefit of the author or his assignees, disconnected from the plate or any other physical existence. It is an incorporeal right to print and publish the map, or, as said by Lord Mansfield in *Miller vs. Taylor*, 4 Burr., 2396, "a property in notion, and has no corporeal, tangible substance." The court proceeds : "The copperplate engraving, like any other tangible personal property, is the subject of seizure and sale on execution, and the title passes to the purchaser the same as if made at a private sale ; but the incorporeal right, secured by the statute to the author, to multiply copies of the map by the use of the plate, being intangible, and resting altogether in grant, is not the subject of seizure or sale by means of this process ; certainly not at common law."

So far as this applies to copyrights it seems explicit enough. But the court proceeds :

“No doubt the property may be reached by a creditor’s bill, and be applied to the payment of the debts of the author the same as stock of the debtor is reached and applied, the court compelling a transfer and sale of the stock for the benefit of the creditors. But in case of such remedy we suppose it would be necessary for the court to compel a transfer to the purchaser in conformity with the requirement of the copyright act, in order to invest him with a complete title to the property. * * * An assignment, therefore, that would invest the assignee with the property of the copyright according to the act of Congress must be in writing and signed in the presence of two witnesses, and it may well be doubted whether a transfer, even by a sale under a decree of a court of chancery, would pass the title so as to protect the purchaser, unless by a conveyance in conformity with this requirement.”

The bill in the present case is evidently framed in conformity with this suggestion in the opinion of the Supreme Court, and, as we understand it, is warranted by the deliberate judgment of that tribunal.

It is insisted, however, upon the part of the patentee that so much of the opinion as asserts that the copyright may be subjected to a decree in equity is *obiter dictum*, and that it is overruled in the subsequent case of *Stevens vs. Gladding*, 17 Howard, 450. That case arose under the same state of facts and involved the same controversy which was determined in 14 Howard. It appears that under that opinion the case was remanded to the Circuit Court for the District of Rhode Island. When the mandate arrived, the judge who heard the case below had died, and when it was called, the counsel for the respondent desired to be heard, “though,” as the judge states, “he frankly avowed that the question passed on in the former case was the only one which could now be raised.”

We have examined that decision with care, and we can see nothing in it that can be considered as reversing the

ruling in 14 Howard, which asserts, as we understand, the right to maintain such a bill as the present. Judge Curtis, in his opinion, states that the positions assumed by the counsel of the judgment creditor are, that copyrights and patent rights are subject to seizure and sale on execution ; that whenever the owner of the copyright of a map causes a plate to be made which is capable of no beneficial use except to print his map, he thereby annexes to the plate the right to use it for printing the map, and also the right to publish and sell the copies and print it ; and that when the plate is sold on execution these rights pass with the plate as incidents or accessories thereto, though no mention is made of them in the sale.

It is in reference to this contention that Judge Curtis uses the language which has been relied upon in behalf of the patentee in this case. He declares that there " would be great difficulty in assenting to the proposition that patent rights and copyrights held under the laws of the United States are subject to seizure and sale *on execution*. Not to repeat what is said on this subject in 14 Howard, 581, it may be added that these incorporeal rights do not exist in any particular State or district ; they are co-extensive with the United States. There is nothing in any act of Congress, or in the nature of the rights themselves to give them locality anywhere, so as to subject them to the process of courts having jurisdiction limited by the lines of States and districts. That an *execution* out of the court of common pleas for the county of Bristol, in the State of Massachusetts, can be levied on an incorporeal right subsisting in Rhode Island or New York, will hardly be contended. That by the *levy of such an execution*, the entire right could be divided, and so much of it as might be exercised within the county of Bristol sold, would be a position subject to much difficulty."

It thus appears that the question alluded to by Judge Curtis was that which had been urged in argument by counsel, viz., the right to subject the copy and patent right to sale *by execution at law*, and that the difficulties suggested by the judge have reference only to such a sale. But the

Supreme Court in the next sentence show that they do not design to decide even this point. Judge Curtis adds: "These are important questions on which we do not find it necessary to express an opinion, because in this case neither the copyright, as such, nor any part of it, was attempted to be sold." And the judge proceeds to show that the only thing attempted to be sold by the sheriff was the right to the copper plate on which the map had been engraved.

In a later part of the opinion the judge says: "For these reasons, as well as those stated in 14 Howard, our conclusion is, that the mere ownership of the copper plate of a map by the owner of the copyright does not attach to the plate the exclusive right of printing and publishing the map held under the act of Congress or any part thereof, but the incorporeal right subsists wholly separate from and independent of the plate and does not pass with it by a sale thereof on execution."

The only questions beyond this which are discussed by the court are whether the penalties imposed by the act of Congress shall be decreed against the purchaser, and whether there should be an account of the profits. We see nothing in the decision which in any way can be held as a withdrawal by the Supreme Court of the distinct assertion in 14 Howard, that an interest under a copy or patent right can be subjected to the payment of the debts of the patentee by a proceeding in equity.

The argument *ab inconvenienti*, urged by Judge Curtis as a reason why such rights should not be considered as liable to seizure under an execution at law, is invoked in the present case. It is insisted that the provisions concerning patent rights in the Constitution and laws are designed to secure to the inventor and author the rights to their inventions and writings, and that this provision would be nullified if those rights were subject to seizure in any way by creditors. But the benefit designed by these provisions would be no more destroyed by the sale for the payment of the inventor's creditors, than by the voluntary sale by himself. If sold to pay his debts, he would have already obtained the benefit of

the grant as much as if sold of his own motion. It is clear he would have the right voluntarily to sell his entire right in any, the remotest, portion of the country. Notwithstanding those rights are co-extensive with the Union, they would pass to his personal representative or legatee; and could be subjected to the payment of the debts of such heir or devisee in any part of the country.

It was long ago settled, as far back as the case in 3 Bosq. & Pul., 777, *Hesse vs. Stevenson*, decided in 1803, that, independent of any provision in the English bankrupt law, the right of the patentee in an invention would pass as assets to his assignee in bankruptcy. Lord Alvanley, in delivering the opinion in the case, says: "But if the inventor avail himself of his knowledge and skill, and thereby acquire a beneficial interest which may be the subject of assignment, I cannot frame to myself an argument why that interest should not pass in the same manner as any other property acquired by his personal industry. * * * * We are, therefore, clearly of the opinion that the interest in the letters-patent was an interest of such a nature as to be the subject of assignment by the commissioners in bankruptcy."

And by the last bankrupt law, R. S. U. S., sec. 5046, patent rights and copyrights, with the other classes of property therein enumerated, are expressly declared to be vested in assignee of the bankrupt. By section 5062 the assignee is required to sell all the estate of the bankrupt upon such terms as he thinks most for the interest of the creditors.

It cannot be denied that under this authority the assignee could make sale of the interest of a bankrupt patentee in the most valuable patents in the remotest corner of the country, in Alaska, or at the Dry Tortugas, unless his discretion in this respect was restrained by a court, upon the ground that a sale at such a place would be manifestly injurious to the estate. If the fact that the operation of the patent is co-extensive with the Union, is sufficient to indicate the absence of the power of sale under a decree, as suggested in 14 Howard, it is not easy to see why the same difficulty

should not prevent the exercise by the assignee in bankruptcy of his unquestioned right of disposition.

If the contention of the patentee in this case is correct, it results that there will exist a class of property in this country, yielding great revenues from royalties, which would be exonerated by this special exemption from the responsibility which attaches to all other classes of property—payment of the honest debts of the debtor; and that one possessed of such patent rights, by skilfully refusing to invest his revenues in any other description of property, may successfully baffle creditors who may have supplied him with the very means by which he was enabled to achieve the success of his patent.

We have been referred to some decisions which it is alleged are at variance with the conclusions at which we have arrived, but a careful examination of them has satisfied us that such is not the case. The case in 1 Holmes' Reports, page 152, which decides that the trustee in insolvency, under the Massachusetts statute, has no title to a patent right, proceeds upon the express words of the statute, which declares that only those descriptions of property which can be seized by execution at law pass to the assignee; and as it is settled that a patent right cannot be taken under an execution at law, the statute necessarily excluded it as assets from the trustee in insolvency. The case in 1 Gallison, 485, simply declares that a sheriff who had sold under execution a number of patented machines for a debt due by the patentee, could not be held liable under that provision of the patent law which declares that the sale of patented machines without the consent of the patentee should subject the vendor to suit for damages.

The case in 4 B. Monroe, 596, *Cooper vs. Gunn*, only decided that, where an author had conveyed the copyright of a book to a trustee for the benefit of his wife in fraud of his creditors, and the trustee had sold the copyright, a judgment recovered by the trustee against the purchaser of the copyright for part of the purchase money, could be subjected in equity to the payment of a judgment recovered by a

creditor against the author ; and the remark of that court, relied upon by the patentee's counsel in this case as sustaining their position, was not applicable to the case, and, in our opinion, does not support the contention.

We have been appealed to with great earnestness to decide in favor of the inviolability of the right of the patentee, for the reason that patentees as a class, notwithstanding the benefits they confer upon the community, seldom participate in the profits which are derived from their inventions ; that they live laborious lives and die poor ; and it is urged that it would be an additional hardship to deprive them of the exemption supposed to be secured to them by their grant from the United States.

Assuming the correctness of this supposition, and that it is really true that they seldom reap the benefit of their labors, it results that what is supposed to be the present state of the law exempting those interests from sale, does not operate very beneficially in their behalf. If, notwithstanding the assumed exemption, they receive such slender profits from their labor, a change in the law could not place them in a worse position. It may be that they might profit by a condition of things which would expose their interests at public sale to competition, and thus bring the merits of their inventions more prominently before the public.

We are of opinion that the decree below should be reversed, and we will sign a decree directing the sale of the interest of the patentee for the payment of the judgment creditor, and directing him to execute the assignment required by the statute ; and appointing a trustee with authority to execute the same, in the event of the refusal of the patentee to do so.

Mr. Justice WYLIE delivered the following dissenting opinion :

I am unable to agree with my brothers in the decision which is announced in this case, and although I have not prepared any formal opinion expressing the grounds of my dissent, I propose to state very briefly some of them.

The plaintiff here, Talbot C. Murray, at the April Term, 1876, recovered a judgment on the law side of this court against Wilson Ager for \$2,164.66, with interest and costs. On this judgment an execution was issued and return was made *nulla bona*. Wilson Ager, the defendant, must be regarded, therefore, as insolvent, as having no visible property on which an execution at law might be levied. The present proceeding is by a bill in equity, filed by the judgment creditor for the purpose of reaching the interests of the defendant in a patent right. The prayer of the bill is that, pending the suit, the defendant might be restrained from selling or assigning his patents; that said patents might be sold under the decree of the court, and the proceeds of the sale applied to the payment of the judgment, and that the defendant might be compelled to execute such assignment of his patents as might be necessary to vest title in the purchaser in conformity with the patent law.

Now, here is a bill the object of which is to reach a species of property which is not subject to execution at law. I think it is a practice of chancery jurisdiction, without exception, that a bill in equity may be filed for the purpose of reaching property of the defendant which is subject to execution, if the property is concealed, or if the property is covered with incumbrances so that the execution at law cannot reach it. The object of the bill in equity is to uncover the property for the purpose of subjecting it to the satisfaction of the judgment.

But here is a new species of bill in equity, the object of which is not to subject property subject to execution at law to the payment of the debt, but to subject property to execution which is not subject to execution at law. When was it ever heard before that a bill would be sustained by a chancery court for the purpose of reaching property which is not subject to execution at law? I have heard of bills in equity being filed in aid of a judgment at law on account of the inability of the judgment creditor to collect his debt out of property which is subject to execution, but this is the first instance that has ever come

under my observation, I feel very sure, and the first instance which I think will be found in the books, in which a bill has been sustained on this new ground, to wit, for the purpose of subjecting to an execution at law a new and peculiar kind of property which it is admitted is not liable to execution at law at all.

Again, it is said that it would be a very anomalous condition of things that a man should be permitted to invest all his money, time and talent in valuable inventions, worth millions perhaps, and yet may set his creditors at defiance. I do not see any strength in the argument. If the inventions are profitable they will return to him in tangible property, property which would be subject to execution, and which might be reached by his creditors. So that I do not think this argument of inconvenience is of much strength in the case.

In all the history of the English chancery courts, and in all the history of the chancery courts of this country, in all the States of this country, up to this day, no such bill as the present one can be found. It is very true that Congress did provide in the bankrupt law that patent rights might be assigned—should be assigned to the assignee in bankruptcy. But that does not reach this case. Congress sometimes may pass a law, and often does, which requires to be construed by the courts; and the latter look into and see whether the enactment is within the powers of Congress. But admitting that Congress had power to make such a provision in the bankrupt law, making patent rights assignable, it does not reach this case. If this is a statutory property which is of a peculiar character, it can only be disposed of in the manner provided for by the statute. Chief-Justice Taney and Judge Nelson, and other judges of the Supreme Court, have severally expressed the opinion that all the patentee's rights arise under the statutes, that he has no common law rights at all. The character of the property and everything that belongs to it is statutory.

Now, in the first article of the Constitution of the United States, it is declared that Congress shall have the power to promote the progress of science and useful arts by securing

to authors and inventors the exclusive right to their respective writings and discoveries. How can this provision of the Constitution be carried out if the moment an invention is made it is to be subject to execution and sale by a creditor. That would not promote the progress of science and the useful arts, it would be a discouragement to inventors.

Then the statute in regard to the property declares how it shall be disposed of. With this view the statute provides that the inventor shall have the exclusive right in a patent for himself or his assignees, and declares how he may assign it, and that assignment can only be made by deed and the deed must be witnessed by two persons. It must be, so far as the subsequent purchaser is concerned, recorded in the Patent Office. Here is a special patent secured to the inventor by the Constitution, and the Constitution declares that the object of giving this exclusive privilege is to promote the progress of science and the useful arts. It gives him the exclusive right in such cases; and yet the very day after the patent is obtained it is subject to execution, and execution here in the District of Columbia upon the whole interest.

Why, this patent right is as extensive as the Union. If an inventor's interest, which is as extensive as the whole United States, which pervades the territories and all the States, may be levied upon and sold under a petty execution in the District of Columbia, that is certainly a remarkable feature of this jurisdiction. As my brother says, Edison's patent may be taken and sold in Key West or in Alaska.

Where did we get such jurisdiction as that? It is said that it belongs to the nature of the property, that it is a kind of intangible property, impalpable, and at the same time as all pervading as the atmosphere itself. But by what authority does a court in the District of Columbia undertake to proceed upon property of that kind which is as extensive as the Union, and sell it under one of our judgments? I should not object so much to sell the interest so far as the territory of the District of Columbia is concerned, but I understand the object of this bill is to sell for the whole Union. If some justice of the peace at Key West, or in Alaska, by chance should find somebody who was a creditor of Edison,

he might sell out the whole of the inventor's property, under a proceeding of this kind, in one of those remote corners of the country.

It appears to me that the whole policy of the law would be overthrown by such a proceeding. I believe that inventors belong to a class of people who are taken under the especial protection of the Constitution of the United States for the purpose of encouraging them, and it is so declared in that instrument. It is for the purpose of promoting the progress of science and useful arts that the exclusive property in the invention is given to the inventor, and in my opinion it is not subject to execution. As to its creating an aristocracy of property, I see nothing in that at all, because, as I have said, if the invention is of any value it will produce property that will be within the reach of creditors. But in the beginning the patentee is generally poor and his invention is not upon the market; perhaps he has not fairly introduced it. It takes time and it takes capital for the purpose of establishing the market value of the invention. It was for the purpose of covering that period of time that the exclusive use was secured to the inventor, and I do not think it is within the intention of the Constitution to allow a creditor of an inventor to pounce down upon his invention before it is established, and before it is introduced to the public and sell him out, lock, stock and barrel. That would not promote the progress of useful arts by any means. He is poor, and if the invention, the work of his brain, is to be seized the moment it is born, and sold out to somebody else under execution, it would be no encouragement to men of that kind. And I feel more free to express my own judgment in regard to the case from the fact that no example has been produced either in the English books or from our own in which a thing of this kind has been attempted.

The case in 14th Howard, *Stevens v. Cady*, contains what is admitted to be an *obiter dictum* of Judge Nelson. In that case it was decided that the copperplate map carried no right to the copyright with it, it merely carried the copperplate. That was the only question before the court. Judge Nelson does proceed to say that the copyright doubtless may be

reached by a creditor's bill, but the same case, having come again before the same court, Judge Curtis, in delivering the opinion of the court, says, there are difficulties in regard to the subject of laying an execution upon patent rights in addition to those that were mentioned by Judge Nelson upon a former occasion, and he says that one of these difficulties arises from the peculiar character of this property, an interest in a copyright which pervades the whole country, and it would not be right in a State, like Rhode Island, for the legal jurisdiction there to sell the whole interest in the copyright. So that I cannot consider this question as having been yet determined by the Supreme Court of the United States. Here is an *obiter* of Judge Nelson which seems to incline one way, and a very strong one of Judge Curtis, in the same case, in the other direction, and, therefore, I have not felt bound by the authority of that case. This property, in my opinion, cannot be sold in this way.

FOX ET AL. vs. DAVIDSON ET AL.

IN EQUITY. No. 6946.

{ Decided March 21, 1881.

{ The CHIEF JUSTICE and Justices WYLLIE and HAGNER sitting.

1. A deed of trust given upon a stock of goods which authorises the grantor to use and dispose of the goods at his own discretion, is void as against creditors.
2. Where the goods and chattels of the tenant have been sold by virtue of an assignment, the landlord's claim upon the fund, to the extent of three months' rent, has priority over the claims of simple contract creditors. This priority being given him by the statute. R. S., D. C., §678.

STATEMENT OF THE CASE.

On the 26th of February, 1878, one Hoff made his note for \$500, payable to the order of Elias J. Hill in one year, with interest semi-annually. To secure the note Hoff and his wife executed, on the same day, to complainant, Fox, as trustee, a deed of trust covering a stock of merchandise and goods in a store on Pennsylvania avenue, Washington, D. C. The schedule attached to the deed after enumerating and describing a number of stoves, ranges, &c., described the other mortgaged goods as follows: "Together with a large assortment of general tin ware and house furnishing goods * * * and every article that may be purchased by way of replenishing said stock after this date and prior to the payment of the matter secured by said trust." Hoff, by the terms of the deed, was to be permitted to retain possession of and use the mortgaged property until default made in payment of the note. The deed was recorded on the day of its execution. A short time afterward the complainant Perreard became purchaser, for value, of the note.

About four months after the execution of this trust, Hoff executed to the defendant Davidson an assignment of all the goods, fixtures, &c., contained in the same store, except those exempt from execution at law, in trust to sell the same, and from the proceeds "to pay *pro rata* or according to their legal priorities," all the debts which Hoff then owed. These debts were enumerated in a schedule attached to the assignment and aggregated \$3,472.50, the first two being described as follows: E. J. Hill, chattel mortgage, \$500; rent, E. Carusi, \$600.

After the execution of this assignment Hoff continued in possession of the store and its contents, and settled all the debts mentioned in the schedule at 85 cents on the dollar, except the two above given.

On the 30th of August, 1879, Davidson, the assignee, without notice to plaintiff, took possession of all the goods in the store and sold the same at auction for \$396.30. Some of the articles sold were among those specifically described in the trust deed to Fox, and the assignment to Davidson; the remainder had been bought by Hoff subsequently to the date of the trust deed for the purpose of replenishing his stock.

At the date of the execution of the assignment (June 12, 1878), the landlord of the premises had a claim for six months rent at one hundred dollars per month, which had not been paid.

Fox, trustee, and Perreard filed their bill claiming the fund by virtue of their deed of trust, alleging that Davidson intended to divert the money from them, and praying that their right might be established. Perreard also claimed that by the terms of the assignment to Davidson, he, as holder of the \$500 note, was made a preferred creditor, and in that character, if not as mortgagee, he should receive the fund.

After the bill was filed Mrs. Lowe intervened by petition alleging that she was landlord of the premises at the time of the assignment; that she had a lien upon the goods, &c., for \$300, being three months rent then unpaid, and claiming the whole fund by virtue of the assignment.

The case was referred to the auditor to state the distribution of the fund (which had been paid into court) and the assignee's account.

The auditor in his report, after allowing commissions to the assignee and the expenses of the assignment, awarded the residue to Mrs. Lowe, the petitioning creditor.

To these allowances and award complainants excepted, and upon the overruling of their exceptions and confirmation of the report they appealed to this court.

Messrs. BIRNEY & BIRNEY for complainant:

1. The trust deed to Fox is valid as against Hoff the

maker, and all persons claiming under him. The landlord's lien and trust deed lien may attach to after-acquired goods. 15 Wall., 828; 1 Hare, 557; 20 Maine, 408; 20 Iowa, 399; 8 Fairfax, 282; Jones on Mort., 138, 672, 683; 12 Wall., 514; 7 Mich., 108, 520; 2 Story, 630; 18 Md., 433.

2. Equity will enforce the trust deed. *Mitchell v. Winslow*, 2 Story, 630. For elaborate opinion and numerous cases quoted from English and other reports, see also 1 Ves., 409, 411; 1 Hare, 549; 2 P. W., 182, 192; 1 J. & Walk., 532; 4 Sim., 524; 6 Ib., 224, 414; 14 N. J. Eq., 408; 8 Price, 269; 4 Myl. & K., 129, 580.

3. The assignment by Hoff to Davidson was fraudulent and void. Hoff was incompetent to make an assignment inconsistent with his prior trust deed duly recorded. Jones on Mort., 138, 683, 672; 21 Conn., 379; 1 Hare, 567; 18 Md., 433.

4. Davidson and all claiming under him could take nothing but what Hoff could lawfully give. 2 Story, 620.

5. The assignment being void all claims under it fail. These are Mrs. Lowe's claim for rent; commission; expenses of assignment.

6. Even if the assignment were good, Mrs. Lowe has no standing in the case, for her lease had expired, the goods sold and those assigned were not the same, and she has no constituted lien, (*Case vs. Beauregard*, 9 Otto, 129), either by act of Hoff, by landlord's lien or judgment at law. 2 Johns Ch., 283; 24 How., 352; 4 Johns Ch., 691.

7. We do not claim under the assignment; we do claim that Davidson, getting possession under the assignment, held the proceeds as trustee for Fox. Prior equity should prevail.

EUGENE CARUSI, Esq., for defendants:

1. The deed of trust from Hoff to Fox was fraudulent and void as to creditors, and a court of equity will not lend its aid to enforce it. *Edgall vs. Hart*, 13 Barb., 380; *Selling vs. Kimmel*, S. C. D. C., May, 1868; *Robinson vs. Elliott*, 22 Wall., 513.

2. The deed of trust being void, complainant is driven to

claim, as a creditor, under the assignment to Davidson. The assignment directs the creditors to be paid according to their legal priorities, *i. e.*, at the time the assignment was executed. At the time the assignment was executed the landlord had a lien upon the stock for three months' rent in arrears, which commenced with Hoff's tenancy and prior to the deed of trust to Fox. Therefore, the lien for rent was entitled to priority over the deed of trust. Rev. Stat., D. C., sec. 678; *Webb vs. Sharp*, 13 Wall., 1; *Fowler vs. Rapley*, 15 Wall., 328.

3. Even if the assignment were fraudulent and void as to creditors, this could not help complainant for the deed of trust being void, as already shown, equity will not enforce it, therefore complainant stands in the position of a simple contract creditor who has not obtained judgment and issued execution thereon. Such a creditor cannot come into equity to set aside a fraudulent assignment. *Berely vs. Staley*, 5 G. & J., 451, 452; *Day vs. Washburn*, 24 How., 356; *Case vs. Beauregard*, 99 U. S., 129.

Mr. Justice WYLIE delivered the opinion of the court :

Under the circumstances of this case and the language of this deed of trust, we are bound to interpret it as authorizing the maker of the deed to carry on his business, and to sell and use the proceeds of the property as he thought proper, and then at the time that the note fell due that the holder of the note secured should be preferred to everybody else in case of a sale of the property by the trustees.

Now, we have decided on former occasions* that any deed of trust given upon a stock of goods which authorized the party who makes it to use and dispose of the goods at his own discretion is void as against creditors. We are of opinion, therefore, that as against the creditors of Hoff this deed is invalid.

The next question then in this case is upon the effect as between the holder of the Hill note for \$500 and the landlord of the premises, of the words in the assignment "*according to their legal priority*," for this Hill debt is recognized by the assignment, although the deed of trust which secured it is void.

Now, at the date of the assignment there were three months and more rent due by Hoff to the landlord, and that instrument professes to secure this rent to the amount of \$600. If the original deed of trust which secured this \$500 note had been valid, that would give it legal priority over the landlord's claim, but as the deed is void, the question recurs, has it any legal priority by virtue of the general assignment as between it and the claim for rent? The language of that paper does not *give* it any legal priority or preference of any sort, it is merely provided that it shall be paid "*according to its legal priority.*" Well, what is that priority? It derives none from the deed of trust, as that is void, and if it derives none from the deed it is nothing more than an ordinary debt having no priority over any other. But the landlord has a legal priority given him by the statute† to the extent of three months' rent.

We have concluded, therefore, that the landlord in this case is entitled to his three months' rent according to the priority given him by law, and that, together with the expenses of the assignment, exhausts the fund.

*Smith vs. Kenny, *ante*, p. 12.

†R. S. D. C., sec. 678.

CAPITOL HILL BUILDING ASSOCIATION No. 2.

vs.

SAMUEL N. HILTON.

IN EQUITY. No. 6290.

{ Decided March 21, 1881.

{ The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

1. A piece of ground encumbered with a deed of trust to secure an indebtedness to a building association, was sold at public auction, subject to the trust. The secretary of the association acted as auctioneer, and announced that the indebtedness to the association amounted to a given sum.

Held, That as between the purchaser and the association the sum so mentioned must be considered as the real indebtedness.

2. The fact that a piece of property is purchased subject to the lien of a building association for advances to a stockholder, which lien the purchaser agrees to discharge by monthly payments equal in amount to that agreed to be paid by the stockholder, does not entitle the association to credit these monthly payments in the same manner that might have been done had they been made by the stockholder. Such a purchaser is to be chargeable only with the purchase money and six per cent. interest until paid.

STATEMENT OF THE CASE.

A piece of property, consisting of a lot of ground in Washington city, was subject to a deed of trust, in which the defendant and another were the trustees. The trust had been given to secure the performance of the condition of a bond executed by William Dolsen, the owner of the lot, in favor of the Capitol Hill Building Association No. 2. The bond, after acknowledging the obligor to be bound in the sum of \$2,000, recited, in substance and by way of defeasance, that whereas the said William Dolsen, a stockholder to the extent of twenty shares in said association, has, by virtue of and in accordance with the provisions of the constitution of the said association, received from the said association, the sum of two thousand dollars: Now, if the said Dolsen, his heirs, &c., shall well and truly pay to the treasurer of the association the sum of \$2 per month upon each of the shares of stock held by him, and all fines and forfeitures which may be imposed upon or incurred by the said Dolsen by virtue of the provisions of the constitution, until the close of the association, or the return of the money advanced to him, then this obligation to be void, else to remain in full force.

Subject to this trust the property was sold at public

auction, the secretary of the building association acting as auctioneer. At the sale it was announced by him that the amount due the association was \$1,800, and that the purchaser could have the option of paying in either of two ways: First, by paying \$500 cash, and the balance in three equal instalments at six, twelve and eighteen months; or, second, by paying monthly instalments of \$40 per month till the whole amount should be paid. The defendant Hilton became the purchaser, and chose the latter mode of payment. Accordingly he paid into the treasury of the association \$40 per month for forty-eight months, making \$1,920, or \$120 more than the amount alleged at the sale to be due.

The plaintiff's bill alleged that the amount actually advanced by it to Dolsen, the obligor in the bond, was in fact \$2,350 instead of \$2,000 as recited therein, and that at the time of the sale of the property the amount due was several hundred dollars in excess of \$1,800, and that a considerable part of the original advance to Dolsen was due and unpaid even after the defendant had paid the \$1,920 to plaintiff. The bill sought to have Hilton removed as trustee, a new trustee substituted, and the property sold to satisfy the demands of plaintiff for the balance alleged to be due.

The decree below was in accordance with the prayers of the bill from which decree defendant appealed.

HINE & THOMAS for defendant :

1. The plaintiff, having taken the bond from Dolsen in which \$2,000 was expressed as the amount advanced to him by plaintiff, and having placed on record the deed of trust referring to the bond and the amount therein specified as advanced, is estopped as against defendant, an innocent purchaser without knowledge of the true state of the account between plaintiff and Dolsen, and without convenient or available means of acquiring such information, to say that a larger sum was advanced.

2. The purchase by defendant of the property, subject to the lien of the association, which he agreed to discharge by making monthly payments of the same amount originally agreed to be paid by Dolsen, the obligor in the bond and a

stockholder in the association, does not make defendant a stockholder in the association, and subject him to a liability to pay the monthly instalments until the close of the association as provided in the bond of Dolsen.

J. T. CULL, for plaintiff:

The state of the pleadings did not admit of the defense set up by the defendant. The allegation in the bill that the trust in question was given to secure an advance of \$2,350, and that said amount was secured upon the property in question by said deed of trust, was admitted without qualification by the defendant in his answer. The defendant's plea is not a plea of a *bona fide* purchase without notice, for he should have denied notice, and every circumstance from which it could have been inferred. Danl. Ch. Pr., vol. 1, 679; 20 Wall., 14. There is no plea of estoppel by the record, nor is it even suggested that defendant was misled by the record. If he had had such a defense he should have set it up distinctly in his pleadings. 10 Pet., 343.

Mr. Chief-Justice CARTER delivered the opinion of the court.

The defendant Hilton was brought into court in this case by a bill in chancery to respond to an indebtedness on account of the purchase of a lot upon which the Capital Hill Building Association had a deed of trust. He became the purchaser of the equity of redemption at a sale of the property, September 2, 1872.

The only question in the case is as to his responsibility; to what extent and how it is qualified by the relations of the trust to the building association. We do not see fit in this case to determine the validity or invalidity of the *inter partes* relation of the stockholders to the building association. If they have mutually agreed upon terms of association and accountability to each other, and the disposition of their property, and that agreement is not against public policy, they have a right to do it. It is not a subject that is involved in the investigation, and we do not see fit to take it into account in deciding this case.

Hilton never was engrafted into the association. He is to be treated upon the outside and as the purchaser of a piece of property liable to discharge a given indebtedness to the association, agreed to have been \$1,809, at the time of the purchase, September 2, 1872, which he was to pay off in monthly instalments of \$40 each. The association exercised the right, as they supposed, to treat him as the original debtor, *i. e.*, credit one-half of his monthly payments to account of "dues" on stock, and the other half toward the liquidation of the indebtedness, according to the building association method of accounting.

We think that, inasmuch as Hilton was a buyer of the property, and agreed to pay \$1,800, the amount of the indebtedness that subsisted and was a lien upon it at the time of the purchase, we should treat him as a debtor chargeable with the payment of that sum with six per cent. interest. We cannot engraft him into this association as a stockholder. We have only power to give effect to that which he has done himself, or agreed to do.

The decree in this case will be the reversal of the decree below with directions to refer the case to the auditor to make a statement of the indebtedness upon the basis of \$1,800, as the debt against the property at the time of the purchase by Hilton in 1872, charging him with the payment of that amount and interest to the time this suit began, less the amount paid by him from time to time as payments were made.

The case is remanded for that purpose.

THE NATIONAL METROPOLITAN BANK OF WASHINGTON

vs.

JANE C. HITZ ET AL.

IN EQUITY. No. 6822.

{ Decided March 21, 1881.

{ The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

1. The rules of the common law respecting the estate in the lands of inheritance of the wife to which the husband becomes entitled, were in force in the District of Columbia prior to the act of April 10, 1869. (R. S. D. C., 727.)
2. Where the marriage took place in 1856, and in 1864, the wife, by the death of her father, became entitled to an estate of inheritance, there having been lawful issue born alive and capable of inheriting the estate, the husband has an estate in the property as tenant by the curtesy initiate, and it may be seized and sold under a common law execution for the payment of his debts.
3. The act of April 10, 1869, has not a retroactive effect and does not where the marriage was contracted before the passage of the act, take away or interfere with the pre-existing vested rights of the husband in the real estate of his wife.
4. The act of Congress of April 27, 1878, providing for the recording of deeds, mortgages, &c., repealed the antecedent laws limiting the time for the recording of certain deeds, so that a deed executed on the 9th of December, 1878, but not recorded until the 13th of May, 1879, can only be valid against creditors without notice from the latter date.
5. Tenancy by the curtesy initiate is an estate thrown upon the tenant by operation of law, and he cannot, by refusing to take it, prevent the title from vesting in him and cause it to remain in the wife, nor can he, by disclaimer, transfer it to others; this would be to make a disclaimer a deed, which it is not, the object of a deed being to transfer property, and of a disclaimer to prevent the transfer; a grantee before consent can disclaim, and so may a devisee who takes by grant, but an heir and a tenant by the curtesy take by operation of law, the one takes immediately upon the death of the ancestor, and the other on the birth of living issue and neither, by disclaiming the estate, can prevent it from vesting.
6. It is not permissible to show a consideration different in *kind* from that mentioned in the deed; but if the true consideration was different in *amount* it may be shown. Thus where the deed purports to be upon a money consideration it cannot be shown that money did not constitute the consideration, or, if voluntary, or on a consideration of marriage or the like, it cannot be shown that it was a moneyed one.
7. A wife's equity to a reasonable provision out of her estate against her husband and his creditors attaches only to such of her property as the husband cannot acquire without the assistance of a court of equity. If the husband or his assignee has already reduced the property into possession, the court will not interfere. There is no recognized principle by which a court of chancery can allow the wife a provision out of an estate by the curtesy initiate already vested in the husband and which his creditors are seeking to have applied to the payment of his debts.
8. Where an estate by the curtesy initiate vested in the husband before the passage of the act of April 10, 1869, such estate is liable for the

husbands debts, whether the credit was given before or after the passage of the act.

9. A judgment merges the cause of action, so that where a judgment has been obtained against one of three makers of a note and the creditors are seeking to have the property of the debtor applied to the satisfaction of the judgment, no inquiry can be made in that proceeding into the consideration or original surroundings of the note. Nor is it any defense that the other parties to the note have not been properly proceeded against by the complainant, for if a creditor is to be prevented from collecting his debt until each of the other debtors has been equally pressed, the debt will never be made at all.

THE CASE is stated in the opinion of the Court delivered by Mr. Justice HAGNER.

NATH'L WILSON, Esq., for plaintiff.

COL. ENOCH TOTTEN for Jane C. Hitz.

The case is heard here in the first instance upon certificate from the special term in equity. The bill filed by the National Metropolitan Bank of Washington against John Hitz, Jane C. Hitz, William G. Metzerott, and Samuel Cross, avers that the complainant corporation on the 28th of April, 1879, obtained a judgment on the law side of the court against the defendant, John Hitz, for \$10,000, with interest from October, 1878; that on the 5th of June, 1879, a writ of *fiery facias* was issued on the judgment and returned on the same day by the marshal *nulla bona*; that on the next day another execution was issued upon the judgment and levied by the marshal on the estate and interest of John Hitz, in the lands referred to in the bill; that Jane C. Hitz is the wife of the defendant John Hitz; that they were married many years ago, and have lawful issue capable of inheriting the landed estate of the mother; that she is seized in fee of several parcels of land in the city of Washington, described in the bill; that John Hitz is entitled to "a life estate in said lands and tenements herein last described, during the joint lives of himself and his wife," and by reason thereof is entitled to have and collect and receive all the rents, issues and profits of the said estate; and that the said estate of John Hitz is subject to execution at law; that the said Jane, so being seized of the said lands, and the said John having said estate therein, the said parties by deed of the 9th of December, 1878, conveyed the same

to the defendants Metzertott and Cross in trust for the sole, separate and exclusive use and benefit of the said Jane C. Hitz for and during the term of her natural life, free from the control of her husband or from any liability for his debts and with power of disposal thereof; and upon the death of the said Jane Hitz without having made such disposition, to hold the same for the benefit of her children—as appears by the deed which is exhibited with the bill.

It further charges that this deed, although bearing date on the 9th of December, 1878, was not received for record in the office of the register of deeds until the 13th of May, 1879; that the complainant by virtue of the said judgment has acquired a specific lien upon the interest of John Hitz in the property; but that the execution of the said deed of trust prevents a sale, under the levy, of the said interest and estate of John Hitz at a fair valuation.

It further states, upon information and belief, that Metzertott and Cross never accepted said trust; that the said deed, after its execution, was placed in the hands of Metzertott to be held by him *in escrow* until certain transactions between John Hitz and the German American Bank should be closed; that it was afterwards obtained by the said Jane Hitz from Metzertott merely for safe-keeping, and was improperly and fraudulently filed for record without the knowledge, privity, or consent of the said Metzertott or Cross, the conditions on which it was to have been delivered and recorded never having happened or been complied with, and the complainant files as an exhibit a copy of an instrument of writing called a caveat, executed by Metzertott and Cross, recorded in May, 1879, stating the foregoing facts and declaring that they had not accepted the trusts contained in the said deed. The complainant charges that, for these reasons the deed of trust is fraudulent and void as against the complainant, and ought to be removed out of the way in order that the complainant, by a sale under the execution, may obtain a full price for the estate and interest of said John Hitz in the premises aforesaid so levied on; and that until the sale of the said estate and interest of Hitz, the complainant is

entitled to have the rents, issues and profits collected and held subject to the further order of the court, as otherwise they will be wasted and utterly lost to the complainant. Whereupon the complainant prays that the said conveyance may be set aside and declared null and void as to the complainant; that a receiver may be appointed to collect the rents, issues and profits of the premises, and hold the same subject to the further order of the court; and that the complainant may have further relief.

The answer of the defendant Metzertott substantially admits the averments of the bill as to the trustee.

Mrs. Hitz answers separately. She states upon information and belief that the promissory note upon which the judgment was obtained against her husband was also executed by certain Mattingly, Donaldson and Prentiss, who are equally liable with John Hitz upon the same; that judgment was obtained against the said parties which was afterwards stricken out, and the action as to them remains open on the dockets of the court; that some of said parties have interposed as defenses to the suit against themselves, that the complainant received at the time of discounting the note certain collaterals which have not been properly applied, and she claims to be entitled to the benefit of whatever defenses may properly be made by any of the parties to the note. She admits that she was married to John Hitz in August, 1856; that children have been born of the marriage who are now living; that she is the sole heir at law of Michael Shanks, who died intestate in May, 1864, leaving a widow and this defendant, his daughter; that at the time of his death said Shanks was the owner of a large fortune in realty and personalty; that the personalty has in great part been wasted by her husband; that upon discovering this fact about the 1st of November, 1878, she assumed exclusive control over all her property, and that her husband relinquished all control over it, and ceased from that time to interfere, directly or indirectly, with the conduct or management of her estate, or any part thereof."

She further says that, in order to remedy in part the wrongs

that have been inflicted upon her through the misappropriations and the mismanagement of her property and estate by the said John Hitz, the said deed of trust to the said Metzerott and Cross, of the 9th of December, 1878, was made, acknowledged, delivered, and recorded. She denies that the said deed was voluntary and without consideration, or with intent to hinder, delay, or defraud the complainant or anybody else ; and she denies that her husband has any interest in said lands which can be taken in execution under the judgment. She also denies the charges as to the circumstances connected with the delivery of the deed to Metzerott.

The answer of the husband substantially raises the same defenses.

The testimony of Mr. and Mrs. Hitz, and of Metzerott and Cross, and of Keyser, the receiver of the German-American National Bank, was taken under a commission. Most of the questions of law discussed before us are really elementary in their character, and might well have been disposed of with a bare statement of the law without any attempt at elaboration, but the case has been argued with such great care and earnestness upon the part of the defendant's counsel that I have considered it proper to state the reasons for our conclusions somewhat at length.

1. The first question to be determined is, what estate did John Hitz acquire in the real property which, after the birth of issue alive, descended to his wife as the sole heir-at-law, upon the death of her father in 1864 ?

This question admits of but one answer. By the uniform declaration of every authorized exponent of the law, from its earliest ages to the present time, it is incontestibly settled that, by the common law, the husband, *from the moment of his marriage*, became entitled by virtue of his marital rights to an estate in the lands of inheritance of his wife *during their joint lives*; that *immediately upon the birth of a living child* capable of inheriting the lands, the husband became entitled to an estate in all the lands of which she might be seized at any time during the coverture *for the term of his own life*; that this estate of the husband during

the life of the wife, which was known as *tenancy by the curtesy initiate*, upon the death of the wife, was called *tenancy by the curtesy consummate*, and that the tenancy by the curtesy *initiate* was one of the forms of estates known as freeholds, not of inheritance, which was created by construction and operation of law. 1 Coke Litt., section 35, 29 *a.*; 2 Kent's Com., 140; 4 Kent's Com., 27; 1 Roper "Husband and Wife," 3, 5.

It is further settled beyond controversy that the husband was seized of this freehold *as of his own right*; that although his title was not *consummate* until the death of the wife he might, during her life, do many acts to charge the lands. 2 Black. Com., 120; 1 Washburne Real Property, 128. That as such he became the tenant of the lord and did homage alone; and if, after issue, he made a feoffment in fee and the wife died, the feoffee would hold during the life of the husband, and the heir of the wife could not, during the husband's life, recover the land. 1 Coke Litt., 558. That he might sell and convey his estate or mortgage it to a creditor. *Central Bank vs. Copeland*, 18 Maryland, 320; *Babb vs. Paley*, 1 Maine, 9; and that this interest would pass to his assignee in insolvency, who could sell and convey to the purchasers a valid title for the life of the husband. *Dejarrette vs. Allen*, 5 Grattan.

These common-law principles were undoubtedly in force in the District of Columbia at the time of the death of Michael Shanks, as they were the law in Maryland on the 29th of February, 1801, and no intervening acts of Congress had changed or modified their operation within the District of Columbia. *Anderson vs. Tydings*, 8 Maryland, 443; *Logan vs. McGill*, 8 Maryland, 420; *Rice vs. Hoffman*, 35 Maryland, 350.

2. The next inquiry is, was this estate of John Hitz such an interest as might be seized and sold under execution at common law for the payment of his debts?

The answer to this, upon all the authorities, must again be in the affirmative.

Says Chacellor Kent: "The husband has an interest in

the freehold estates of his wife, which may be seized and sold on execution ; and if the assignee or creditor of the husband, who takes possession of the estate on a sale on execution of his freehold interest, commits waste, the wife has an action against him in which the husband must join ; for though such assignee succeed to the husband's rights to the rents and profits, he cannot commit waste with impunity.' See also *Dejarnette vs. Allen*, 5 Grattan.

The effect of a levy and sale of the husband's interest is the same as that of a conveyance by him which would pass the freehold leaving the reversion in his wife. 1 Maine, 6 ; 18 Pick., 23 ; 2 Kent, 131 ; see also the numerous cases cited in *Herman on Executions*, 134. This doctrine has been repeatedly asserted, *totidem verbis*, by the courts of Maryland. *Anderson vs. Tydings*, 8 Maryland, 427 ; *Logan vs. McGill*, 8 Maryland, 470.

The legislature of that State, to abate the hardship of the possible ejection of the wife under such a sale from her own inherited landed estate, passed the statute of 1841, ch. 161 ; and in reference to the state of the law as thereafter existing, the court says, in *Rice vs. Hoffman*, 35 Maryland, 344 : "This interest of the husband (his curtesy *initiate*) was liable to be taken in execution and sold at any time for his debts until the act of 1841, ch. 161, which provided 'that no real estate hereafter acquired by marriage shall be liable to execution *during the life of the wife* for debts of the husband.' The effect of this act was not to destroy the tenancy by the curtesy, but to suspend the right of execution on the part of the husband's creditors during the life of the wife."

8. There is no such statute in force here *postponing* the right to sell under an execution levied upon the curtesy interest of the husband. But it is insisted upon behalf of Mrs. Hitz that the act of Congress of the 10th of April, 1869, took away all rights of the husband in the real estate of his wife, and exempted it from all responsibility for his debts as well in the past as for the future.

Is this contention well founded, is the next inquiry?

This real estate, as we have seen, descended to Mrs. Hitz

in 1864, after the marriage and birth of children alive, and whatever were the husband's rights under the existing law, they were unquestionably vested in him before 1869, when this statute was passed.

These rights could be destroyed by the act of 1869 only upon the theory, 1st, that the statute is to be construed retroactively, and, 2d, that if this construction is to be given to it, it was competent for Congress to pass a law destroying the vested rights of John Hitz as tenant by the curtesy initiate, and transfer them to his wife, and thus remove them beyond the execution of the complainants.

In our opinion, neither of these propositions is maintainable.

The act as codified in section 727 of the Revised Statutes of the District of Columbia, is in these words: "In the District the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband shall be as absolute as if she were not married, and shall not be subject to the disposal of her husband nor be liable for his debts."

The language of the section is peculiar. It is elliptical in form, for according to its literal phraseology it is "the *right* of any married woman to any property" which "shall not be subject to the disposal of her husband, nor be liable for his debts;" and not *the property* itself. But assuming that this peculiar phraseology does not affect its meaning, it seems to be plain that no assertion to the contrary can be sustained, that the lawmaking power did not *in words* declare that the statute should be retroactive in any of its features, and if such an interpretation is to be given to it it can only be effected by judicial construction. It is manifest that all the other provisions of the statute which are incorporated in the three following sections, viz.: the power given the wife to convey or devise her property as a *feme sole*—to contract and sue, and be sued in her own name—and the right of the creditor to enforce the collection of judgments recovered against her by execution against her separate estate, are all of prospective operation merely. To construe

this portion of the law retrospectively, therefore, would be inconsistent with the manifest import of the residue of the statute; and some strong reason should be shown for adopting such a construction. The wholesome principles controlling courts in their construction of statutes in this particular are well expressed in *Williams vs. Johnson*, 30 Md., 507: "It is a sound rule of construction, founded on the wisdom of the common law, that whenever a statute is susceptible, without doing violence to its express terms, of being understood either prospectively or retrospectively, courts of justice invariably adopt the former construction. A statute ought not to have a retroactive operation, unless its words are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature could not be otherwise satisfied. And especially ought this rule to be adhered to when such a construction would alter the pre-existing situation of parties, or would affect, or interfere with their antecedent rights."

It cannot be said that the retrospective construction contended for is the only one "that can be annexed to the words." On the contrary, the construction naturally arising out of the plain import of the language, less in derogation with the then existing law, and producing none of the injurious effects upon the situation of parties, so deprecated by the courts, is that which would hold that the statute applies only to the case of persons who should *thereafter* marry, and has no operation upon the circumstances of those who may have been married before the passage of the law. If the statute should be construed retrospectively it is difficult to see where its embarrassing effects would cease.

The first obvious result would have been to divest the estate of every husband then within the District of Columbia, in whom at that time a tenancy by the curtesy was vested. Such an interest might have been the property of the possessor for half a century; the sole support of an aged man who, while in prosperity, might have spent his substance in promoting his wife's comfort, and whose generosity may have placed in her the title to the land. Without warning,

by this construction of the law, he would be turned out of his possession and compelled to surrender it to others, perhaps entire strangers to him.

Again, if the property of the wife, thenceforth, was literally no longer to be liable for the debts of the husband, might it not be equally well contended that the joint mortgages or deeds of trust of husband and wife given to secure his debts would in like manner be discharged? The husband's curtesy interest, before the date of the act, could be mortgaged to pay his debts. If his estate was confiscated by the statute, would the mortgage upon this confiscated interest remain in force?

If Congress had designed the adoption of a policy productive of such grave consequences, is it not reasonable to suppose it would at least have made use of language demonstrating, by the introduction of a few words, that the law was intended to apply to cases where marriages had been contracted *before* the enactment of the law as well as to those to be contracted afterwards.

In the case of *Herbert vs. Gray*, 40 Md., 530, it was decided that the act of 1872 which provided "that a married woman may be sued jointly with her husband, on any note, &c., which she may have executed jointly with her husband," applied only to such instruments executed after the passage of the act. The court pointed out that the language of the law was not "which she may *heretofore* have executed," but the words, "*which she may have executed*," must according to the settled canons of construction, be taken to apply to the time of beginning the suit, and not of the passage of the law. The headnote to the case of *De Hart vs. Dean*, 2 Mac Arthur, 60, distinctly states that the General Term there held that this provision of the statute should receive only a prospective construction. This particular expression does not appear in either of the opinions in that case, or we should have been content to rest our decision upon that case alone. But we are well satisfied that the syllabus of the case announces the proper construction of the act. Such, too, appears to be the view of the Supreme Court of the United

States as to this statute, as expressed in the case of *Sykes vs. Chadwick*, 18 Wallace, 148, where the Court say: "The sole object of the statute was to *prevent* the husband from *acquiring* such an interest in his wife's property." But if the words of the statute could reasonably be construed to bear this interpretation, we are of opinion that such a provision would have been beyond the Constitutional power of Congress. Its effect would have been a general confiscation of the vested rights of property in every man holding as tenant by the curtesy within the District of Columbia, by a mere Congressional edict, in the face of the Congressional provision which declares that Congress shall not deprive a citizen of life, liberty or property without due process of law, which, according to Lord Coke, means the old law of the land. The general principle that a statute which attempts to confiscate the property of a citizen, or surrender it to another, without trial or judgment, is rather a sentence than a law, and is as entirely at variance with the first principles of natural justice and of the social compact as with inhibitions of the Constitution, is, of course, too firmly fixed to need enforcement by authority. But a multitude of well-considered cases show that the principle has been applied by the courts to special laws attempting to interfere with the vested rights of the husband in his wife's land. Its application is very clearly vindicated in the case of *Rose vs. Sanderson*, 38 Ill., 243. The legislature of that State enacted a law which declared that all property, both real and personal, belonging to any married woman as her sole and separate property, &c., shall, notwithstanding her coverture, be and remain, during coverture, her sole and separate estate under her sole control, &c., and not be subject to the disposal or interference of her husband, and be exempt from execution for his debts. The Court says:

"Can a life estate *once vested in the husband*, be possibly considered as coming under the description of property belonging to any married woman as her sole and separate property? That is to say, can the property of one person be justly described as 'belonging to' another? This would be

simply a contradiction in terms. Yet when this law was passed, the property in controversy, to wit, the life estate of the husband levied on, was as completely his as if his wife, before he married, had owned it and conveyed it to him for a valuable consideration."

See, among many authorities, 2 Bishop on Rights of Married Women, Sec. 43; *Westervelt vs. Gray*, 12 N. Y., 212.

Indeed, there can be found no statement to the contrary in any text-book of authority, and we have been referred only to a solitary case clearly in opposition to this uniform course of decision—that of *Ruyh vs. Ottenheimer*, 6 Oregon, 231. There can be no question that this decision is directly in opposition to the doctrine here announced, and the court, in its opinion, admits that such is the case, and bases its judgment upon the peculiar circumstances attending the settlement of that country. The court refers to the prevailing custom when patents were issued to settlers, to enter one-half the land in the name of the wife; and declares that this recognition of an equal right of the wife in her property was interwoven with the texture of society in that community. They further say the constitution was made by rough settlers who had been accustomed to recognize this well-nigh universal tenure of the lands in the Territory, and who must have understood that the language they thus introduced in their constitution was to affect all lands in the State, whenever acquired. It may be that this judgment may be maintained for the future as an authority in Oregon, but we can hardly suppose it could be taken as in force in any other community in the country, and it would be inexcusable in a community like this in which we live, to depart from the well-ascertained landmarks of the law in deference to any such novel ruling, confessedly founded upon peculiar conditions of society existing only in the jurisdiction where the opinion was announced. The case stands as a legal Melchisedek, without pedigree or descendant.

We are referred in the brief of the counsel of Mrs. Hitz, to the act of Congress of 19th June, 1860, which declares

that the power was thereby conferred upon the courts of the District in all cases where a divorce is granted, "to award to the wife such property, or the value thereof, as she had when she was married, or such part," &c., "as the court may deem reasonable;" and it was insisted that if Congress possessed the power to pass a law granting such power to a court, it must equally possess the authority to divest the husband's title, without the intervention of a court. It would be sufficient to remark that no such power can now be claimed to reside in the courts of the District, as the provision in question was studiously excluded from the Revised Statutes of the District of Columbia, although every other sentence of the act of 1860 on the subject of divorce is carefully retained; and this would seem to afford strong evidence of legislative construction of the impolicy, if not of the unconstitutionality of the provision in question. But if the provisions were still in force, the question would remain, whether it was designed to affect property acquired under antecedent marriages, and its construction, therefore, would present a second case for interpretation more obscure than that under examination—*ignotum per ignotius illustrare*.

In so far as the original statute professed to recognise any power in the courts to make such provision in cases of divorces *a mensa et thoro*, it was clearly without the sanction of the recognised principle attending divorces *a vinculo*, as was declared in the case of *Stephens vs. Tolly*, Croke Eliz., 908.

In *Greenly's case*, 8 Coke, 72, it was decided upon the proper construction of the 32d Henry VIII, ch. 25, that where a husband aliens and is afterward divorced *causa precontractus*, or for any other cause *that dissolves the marriage a vinculo*, the wife's rights are reinstated and she may enter. But this is upon the express ground that the sole basis of the husband's right is the marriage; that his right exists only in privity, and on a divorce, *which totally dissolve the marriage ab initio*, all privity between them is at an end, and he has no more claim than any other stranger to intermeddle with her estate. *Cooley's Const. Lim.*, 285; *Wright vs. Wright*, 2 Md.

Cases were also cited to show that legislatures have passed laws modifying the existing provisions respecting dower, which have been sustained by the courts, as implying a similar power with respect to curtesy interests. But the distinction between the two cases is quite plain, and is well explained in Cooley's Constitutional Limitations, p. 361. The potential right of dower during the life of the husband is a mere expectancy which may never be realized or possess an actual existence. Until it is vested, after the husband's death, and perhaps not until it has been actually assigned, it cannot be considered as an estate at all, and there can be no pretence of vested rights in connection with it. Whereas with respect to tenancy by the curtesy initiate, we have seen it occupies the position of all other vested estates, and is entitled to the same immunity from confiscation without due process of law.

After the widow's right of dower has been vested in her, the legislature could no more deprive her of it by statute than they could condemn her to death without accusation or hearing.

It is clear, therefore, in our opinion, that the married woman's act does not interfere with the judgment.

4. But it is insisted upon the part of Mrs. Hitz that the lien never existed, because before the recovery of the judgment Hitz and his wife had united in a conveyance of their entire interest in the land to Metzerott and Cross, as trustees.

If this deed is operative from its date, of course this contention is correct. But it is replied that although the execution of the deed of trust preceded the recovery of the judgment, yet as it was not recorded until after the entry of the judgment, the judgment must prevail over it; and, this objection is based upon the provisions of the statute of 27th April, 1878, which is in these following words :

"All deeds, deeds of trust, mortgages, &c., and any instrument of writing which by law is entitled to be recorded in the office, &c., *shall take effect and be valid* as to creditors and as to subsequent purchasers for valuable consideration without notice, *from the time when such deed, deed of trust,*

&c., shall, after having been acknowledged, approved, or certified, as the case may be, be delivered to the recorder of deeds for record, and from that time only ; and the recorder of deeds shall note on each deed, &c., the day and hour when the same shall be received."

This statute repealed the antecedent laws limiting the time for the recording of certain deeds, and it would be competent now to withhold a deed of trust from the record for years without invalidating its effect, provided the rights of creditors, or purchasers without notice, are not affected thereby.

The words of the statute are perfectly plain. *Every* such deed as that under examination shall *take effect and be valid* from the time it shall be delivered to the recorder of deeds for record, and from that *time only*. The time of record of this deed was May 13, 1879, and by the explicit declaration of the statute, *from that time only* can it be of effect or valid against creditors without notice. Two decisions of the Supreme Court of the United States may be cited as showing the views entertained by that court as to the effect of similar provisions in State statutes.

In *McCoy vs. Rhodes*, 11 Howard, 140, it appeared that McCoy recovered a judgment against Rhodes on the 24th of February, 1840, and it was insisted that this judgment should not prevail as a lien against a deed executed by Rhodes on the 7th of December, 1839, which was not recorded until the 10th of December, 1841, after the rendition of the judgment. The court says : " According to the statute law of Louisiana no notarial act concerning immovable property has effect against third persons until the same shall have been recorded in the office of the judge of the parish where such property is situated. In relation to third persons the act of sale not recorded is considered as void. The deed being a notarial act took effect the 10th of December, 1841, against the judgment creditor, and as the lien of the judgment attached the 24th of February, 1840, when the title was in Rhodes, the debtor, this deed is of no force against the judgment, nor are the subsequent deeds founded upon it."

In *Taylor vs. Doe*, 13 Howard, 298, the court, in construing the statute of Mississippi upon the subject of the recording of deeds, which is in these words: "Deeds of trust, &c., are valid as against purchasers only from the period at which they are delivered to the proper recording officer." *Held*, That a trust deed dated 21st of September, 1840, recorded 7th of December, 1840, must by the operation of the registry statutes be inevitably postponed to the rights of the claimant under a judgment recovered on the 17th of November in the same year. Indeed, any other construction of such provisions would, in the uniform language of the courts, fritter away the registry laws and render them wholly nugatory as to creditors; for, as between the parties, the deeds were good without recording.

There is no pretense that this complainant had notice of the execution of this deed of trust before it was admitted to record. Indeed, it appears clearly in proof that it was not intended it should be placed upon the record until Hitz's indebtedness to the German-American Bank should be adjusted; and this condition would certainly have postponed the recording beyond the time when it was actually admitted to record. The deed was withheld from the record by the express advice of Mrs. Hitz's counsel for the purpose of preventing notice of its execution, with a view to allaying excitement among the creditors of the broken bank. The possible injury to Hitz's creditors which might result from giving the deed efficacy from its date against intervening creditors must be apparent. By withholding it from the record, persons advised by their counsel that Hitz was seized of a valuable interest in his wife's land which would be liable for his debts, might have been induced to grant or extend to him credit, and thus incur the loss of their debts upon the production five months or five years afterwards of a secret deed withheld from the records for the purpose of lulling them into a false security.

It is unnecessary to examine in detail the other objections taken by the complainants to the validity of the deed of trust to Metzerott and Cross. Admitting that those trustees

had not accepted the trust actually or by implication, in such wise that their disclaimer, recorded after the registry of the deed, would be effectual to discharge them from the trust, still this court would not hesitate to sustain the trust in favor of the beneficiaries, if otherwise valid, and would proceed on application, or of its own motion if necessary, to the appointment of suitable persons in the place of the disclaiming trustees.

5. It is further insisted upon the part of the wife that notwithstanding the irregularities in the registry of the deed, the judgment created no lien upon the curtesy interest of Hitz, because by his words and acts he had previously disclaimed all interest in the real estate of his wife; that the deed of December 9th, 1878, was but a mere formal expression of his antecedent purpose, and that the deed, though unrecorded, should be sustained as an effective settlement by the husband upon the wife upon valuable consideration.

The statements concerning the supposed disclaimer are to be found in the answer of Hitz, pages 17 and 19, in these words: "He further says that on or about the 1st of November, 1878, he ceased to have anything to do directly, or indirectly, either as the agent of Mrs. Hitz, or otherwise, with the real estate or personal property belonging to the said Jane Hitz, by her inherited from her father, and that he has not since that time in any wise interfered with the same; and he further says, that he never has asserted and has never known or believed that he had any control over, ownership of, or estate in, any of the property inherited by his said wife, Jane C. Hitz, by virtue of his marital relations and does not seek now to do so." Again: "And this defendant does not now assert, and never has asserted any title in him in or to the said premises, and that he does not now claim any title or interest thereto or therein. He further says that the truth is that he never had anything to do with the title of Jane C. Hitz, except as her agent, and that separate accounts of the income thereof have always been kept, thus treating the property as her separate estate

coming from the estate of M. Shanks, deceased." In Mrs. Hitz's answer, page 14 of the record, she states, "that on or about the 1st of November, 1878, she assumed exclusive control over all her property, and that the said John Hitz thereupon relinquished all control over it, and ceased from that time to interfere directly or indirectly with the management or conduct of her estate, or any part thereof, &c."

John Hitz, in his testimony, page 55, says: "I treated this as separate property always. * * * I always looked upon myself as her agent and had the right by courtesy to control it, and so long as she made no interference." And again, he states, that, at the time the deed was made, or the 9th of December, 1878, he controlled the property, but surrendered possession of it to her in November, 1878. In question 151 he is asked: "Did she say anything about getting rid of your controlling interest in the property; such as you might have had or might assert by virtue of being her husband. (A.) I do not remember anything of the kind if she did. There may have been something. I had my own ideas about that at the time. (Q.) What were they? (A.) I never claimed any controlling rights, then or previous thereto, to the title of the property. The income went by courtesy as long as she did not object to my collecting it."

Mrs. Hitz, in her testimony, states that after her father's death the estate was managed by Mr. Hitz; that she took very little part in its management; that Hitz collected the rents, and that in November, 1878, she resumed possession and control of the property personally, and Hitz then turned it over to her, and that since that time the rents have been collected by her agent, Sherman.

We fail to see in this testimony, especially when taken in connection with the other proof, anything which could in law be taken as sufficient evidence of a purpose upon the part of Hitz before the execution of the deed of trust to disclaim or abandon his rights in the real estate as husband. But the authorities agree that if he had entertained such purpose, it could not have been legally effected by disclaimer, even in writing. As the result of the authorities,

it is stated in 1st Washburne on Real Property (128): "And this right initiate, as well as the estate consummate, is liable to be taken for his debts, nor can he defeat the right by any disclaimer of his right of curtesy." Among other cases in which this doctrine was examined, is that of *Watson vs. Watson*, 13 Conn., 83; in which a surviving husband sued in ejectment to recover possession from her children of lands left by his deceased wife. The children offered in evidence a written paper under seal, executed and acknowledged by the husband after the death of his wife, and duly recorded, in which he disclaimed all pretense of right or claim to the lands as against all persons, and especially as against the children. Upon the part of the husband this paper was objected to as inadmissible, and the objection was sustained. The court says: "The object of a disclaimer is to prevent an estate passing from a grantor to a grantee before title vested, but if the grantee once assents and title is thereby vested in him, he cannot by any subsequent disclaimer revest the title in the grantor. This would be to make a disclaimer a deed, which it is not, the object of a deed being to transfer property, and of a disclaimer to prevent the transfer. An heir cannot by disclaimer prevent a title from vesting in him; it vests immediately upon the death of the ancestor. He cannot by disclaimer cause the estate to remain in the dead ancestor. Nor can he by disclaimer transfer the estate to any other person as heir of the ancestor. A grantee before consent can disclaim, and so can a devisee who takes by grant, to which assent is requisite. Does tenant by the curtesy stand as heir or as purchaser? It is an estate thrown upon the tenant by the curtesy by operation of law. It partakes rather of the character of an estate acquired by descent. Like the heir, he cannot, by refusing to take it, cause it to remain in the wife, nor can he by disclaimer transfer it to others. The estate thus vested in him becomes immediately liable for his debts, and he cannot, by any refusal to take the property, defeat the claims of his creditors."

The unrecorded deed then derives no validity from the supposed disclaimer of title by acts *in pais*.

6. But it is further insisted upon the part of Mrs. Hitz, that the deed to Metzerott and Cross was not voluntary and fraudulent as to creditors, but was founded upon valuable and meritorious considerations which will prevail even against a judgment recovered before the record of the deed. And the attempt is made to assimilate the present to those cases in which *bona fide* sales with payment of the consideration, but without conveyance, are allowed over a subsequent judgment against the vendor still holding the legal title.

The consideration named in the deed of trust is one dollar, and it is attempted to show against the objection of the complainant that it was executed in fact upon very different inducements. It is settled that it is not permissible to show that the real consideration was different *in kind* from that mentioned in the deed. Thus in the case of *Sewell vs. Baxter*, 3d Md. Chancery Decisions, 454, the chancellor said: "The deed upon its face is voluntary, the nominal consideration of \$5 mentioned in it being introduced simply to give it the character of a bargain and sale." And he proceeds to declare that it is not competent for the grantee to show by parol that it was not a voluntary settlement by her father upon her, but that the land was purchased and paid for by her father with her money.

The admission of such evidence would be doubly dangerous where, as in the present case, it consists of the testimony of the grantors in the deed, the husband and wife, endeavoring to change and contradict its averments in the interest of their own equitable grantee, the wife herself. Unless we are to suppose that the furnace of financial affliction would consume away the innate dross of human nature, the creditors or others outside of the benefits created by the deed might as well despair of any result at variance with the present wishes of the witnesses who are at once the grantors and the grantee.

On the other hand it is, of course, admissible to show that the true consideration was different *in amount* from that

mentioned, provided it be not different *in kind*. But "where the deed purports to be upon a money consideration, it cannot be shown that money did not constitute the consideration, or if voluntary, or on consideration of marriage or the like, it cannot be shown that the consideration was a moneyed one." *Mayfield vs. Gilman*, 31 Md., 240.

The admissibility, therefore, of such evidence must be tested by the principle just mentioned.

Mrs. Hitz, one of the grantors and the equitable grantee, in her answer, in reply to the charges of the bill that the conveyance was voluntary and fraudulent against the complainant and others, says, that having discovered that the greater portion of her inheritance had been lost or appropriated by John Hitz, she assumed exclusive control over her property about the 1st of November, 1878, and that in order to remedy in part the wrong so inflicted upon her through the misappropriations and mismanagement of her property by her husband, the said deed of trust was made and executed.

John Hitz, the other grantor, in his answer, says that his wife, at his request, joined in the conveyance in fee simple to Mattingly and Prentiss of certain other valuable property, previously conveyed by him to Hatch, in consideration and upon condition that he would execute in due form of law the conveyance to Metzerott and Cross. And that she also conveyed her dower right in such property as stood in the name of John Hitz to Benjamin U. Keyser, at the urgent request of the defendant, John Hitz, to secure the payment of any balance that might be found due to the bank; and he also averred "that other and more valuable considerations for the executions of the said deed existed at the time."

Metzerott, one of the grantees, declared that the deed was delivered as an *escrow* to be held and not delivered to Mrs. Hitz until all the transactions of Hitz with the German Bank had been settled, and that it was placed on record by Mrs. Hitz in breach of her agreement with the trustees.

The evidence of Mrs. Hitz states that she was not satisfied with the way in which her property had been managed, and that she made it a condition of her writing in the deed to

Keyser (meaning to Mattingly and Prentiss) of the New York House, that the residue of her estate should be conveyed to trustees. She is asked: "Will you state upon what other considerations in addition to this New York House this conveyance was made to you, as you understand it?" She states in reply: "Well, I don't know what other consideration there was. (Q). There was no other consideration than the exchange of the New York House—your deed of that? (A). That was all."

John Hitz, on his examination, when asked to state upon what consideration and under what circumstances that conveyance was made, replies: "The consideration was an obligation on her part that she would sign a conveyance of the property on Pennsylvania avenue, corner Jackson Hall Alley."

Metzerott, in his testimony, says Mr. Walter Cox was at that time Mrs. Hitz's counsel, and Mrs. Hitz told me she asked Mr. Cox what, after Mr. Hitz's debts were all paid, and if anything was left of her property, could be done to protect that so that it could not be touched at any future day for the debts which he might create. She stated that Mr. Cox advised her that she should get him to execute such a deed in her favor to a trustee, or to two trustees, friends of hers, and she asked me whether I would consent to act as such. This occurred in my store a short time after the failure of the German American Bank and before the deed was made. I told her of course it was understood that that paper was not to go on record until all matters were settled, and she said that Mr. Cox told her that the paper would not go on record until all present claims against Mr. Hitz had been settled up. That was before the paper was executed. That he then went to Mr. Cox's house with her, and Mr. Cox then said that that paper would have no effect and would create a very bad impression if it was placed on record, that it could not be of any effect, but that it was an excellent thing for the future."

The dates of the deeds are important, the deed of trust to Metzerott and Cross bearing date of the 9th of December,

1878, and that to Keyser of potential right of her dower in her husband's land was executed 2d of November, 1878 ; and that to Mattingly and Prentiss of the New York House of the property previously conveyed by her husband to Hatch, bears date 18th December, 1878 ; no two of the deeds were executed contemporaneously.

Upon a careful consideration of the whole testimony, we cannot arrive at the conclusion that the evidence sustains the allegation in Mrs. Hitz's answer that the deed was given to reimburse her for her husband's former extravagances, or the different assertion in her testimony that it was given upon no other consideration than that she should contemporaneously execute a deed of the New York House, nor that it sustains the averment in the answer of John Hitz that the consideration was the execution of the hotel deed—the release of her dower in the lands of Hitz and other valuable considerations. On the contrary we think the effect of the evidence is to sustain the further statement in Hitz's answer, (page 18) and in his evidence, page 59, and in Metzertott's evidence; that the purpose of the wife was to save her property from further entanglement by removing it entirely, if possible, from her husband's control, and from liability for his future debts.

And this is altogether in consonance with the language of the deed itself, prepared by eminent counsel (according to Metzertott's evidence), at the request of Mrs. Hitz for the protection of her property, thereafter, if the existing debts of her husband should all be paid, from any future indebtedness on his part.

The deed of trust to Metzertott and Cross then was a voluntary settlement by John Hitz of his existing vested interest as tenant by the curtesy *initiate*, for the benefit of his wife.

But such a voluntary conveyance from a husband to his wife, so far as the same is in derogation of the rights of subsisting creditors, in the eye of the courts is fraudulent and void. Hermann on Executions, sec. 134.

It is with no idea that a word of authority can be supposed

necessary in support of so manifest a proposition, that I refer to the case of *Vanduzen vs. Vanduzen*, 6th Paige Ch., 866, but I quote from the opinion of Chancellor Walworth because it so well expresses the feelings which have inspired me in the examination of this case.

In that case the bill was filed by a wife against a worthless husband and his creditors for an injunction to prevent a sale under judgments. It charges that the judgments were recovered for money won at cards, though this was denied. The chancellor: "Neither do I think it competent for the wife in such a case as this to impeach the consideration of a judgment recovered against her husband, unless she can also satisfy the court that the judgment is the result of collusion or conspiring between her husband and mere nominal creditors to deprive her and her children of an equitable right to a provision for a support out of her property. There is no doubt that the husband has ruined himself by gaming, and if his interest as tenant by the curtesy in his wife's real estate is sold on execution upon this judgment, his wife and children will be left without any means of support during his life.

"In the case under consideration, with the strongest desire to protect if possible this unfortunate wife and her helpless children, who are about to be reduced to beggary in consequence of the husband's improper conduct, aided by his creditors, I have not been able to find any principle either of law or equity which can authorise this court to interfere with the husband's legal estate as tenant by the curtesy *initiate* in the wife's real property, so as to place it beyond his reach and the reach of his creditors."

7. It is also claimed that this court in the present case should restrain the creditor from realizing his claim by the sale of the husband's curtesy interest in his wife's land, until a suitable provision should first be made out of the interest they expect to sell, for the benefit of the wife and her children, in view of the wasteful manner in which the husband has dealt with her estate.

The cases cited in support of this contention refer to the

action of courts of chancery in securing what is called the wife's equity to a reasonable provision out of her estate, but they are not at all applicable to the present case. The wife's equity relates only to her right to a provision out of the claims of the husband upon the wife's property *in action*. According to Chancellor Kent, Vol. 2, (141), the wife's equity only attaches upon that part of her personal property in action which the husband cannot acquire without the assistance of a court of equity. If the husband or his assignee has already reduced the property into possession a court of equity does not interfere.

In *Mitchell vs. Lanier*, 9 Humphreys, 148, where the wife made this claim against her husband and his creditors in a case of great hardship, the Court of Appeals of Tennessee says :

"The wife's right to an equitable provision out of the estate, against her husband and his creditors, ceases when the husband obtains possession of the estate. In the case before us the husband has been long in possession, and, as a tenant by the curtesy, is entitled to a life estate therein. Upon the whole we are constrained to say there is no reported case, nor is there any principle recognized by a court of chancery by which the relief asked can be sustained."

In the present proceedings Hitz is not seeking the aid of a court of chancery to obtain possession of his *wife's estate*. He had been seized of this vested estate since the death of Michael Shanks in 1864. The complainant is a creditor who was authorized to trust him upon his long possession of this curtesy interest, of fourteen years duration when this note was given. The bank is not here seeking to seize the property *of the wife*, but to sell the interest of the husband in her lands, belonging to him as firmly under the laws of the country as if his wife and her father had conveyed it to him before the marriage.

8. The circumstance brought to our attention that the credit was not given by the bank to Hitz until after the passage of the act of 1869, and that, therefore, the bank was warned of the purpose of Congress, and should not be

allowed to look to this property for payment, is quite immaterial. What did the act of 1869 advise these creditors? Properly construed, according to the unmistakable canons of interpretation, it clearly told all the world that Hitz's curtesy continued to be liable for his debts notwithstanding the passage of that act; and the fact that they trusted him after the passage of the act of 1869, is therefore as powerless to defeat their lien as would be the fact that they had trusted him after the passage of that act upon the faith of property acquired by him by inheritance or by hard labor before their eyes. One of these descriptions of property was just as fully liable for his debt before the passage of the act of 1869 as the others, and they all remained equally liable after the law had passed, wholly unaffected by its enactment.

9. The counsel for Mrs. Hitz have urged with great earnestness that on equitable principles this curtesy interest should not be sold until some effective proceedings have been taken by the complainant to collect the debt from the other parties to the note. The intimation is made that under the existing condition of affairs the husband's curtesy interest is to be sold to the infinite distress and injury of his wife, while the other parties are to be left undisturbed, and this too in the presence of a claim by them in the suit at law that the complainant has dealt unfairly with them in not applying certain collaterals which, if properly applied, would be a satisfaction of the judgment in part or in whole.

Apart from the fact that there is no proof supporting this allegation, it is manifest that the judgment against John Hitz merged the cause of action as to him—that no inquiry can now be made in this proceeding into the consideration or original surroundings of the notes, and that if the complainant is to be prevented from collecting the money from either of its debtors until each of the others shall have been equally pressed, the debt will never be made at all. If Mrs. Hitz shall pay this judgment out of her other property which is unaffected by it and have it assigned to her use, she will be entitled to be reimbursed from each

of the other debtors, in the same way that either of them who might pay the judgment could claim reimbursement of his aliquot proportion from the estate of John Hitz.

The hardship of a decision in favor of the complainant has been pressed by the counsel of Mrs. Hitz with great feeling and eloquence. It required no such appeal to inspire our sympathy in her behalf, and this feeling has impelled us to a more careful examination of the whole case with an anxious desire to give to her at this late day, to a limited extent at least, something of the protection which neither her father nor her friends had the forethought to surround her with before her marriage.

By a proper ante-nuptial settlement, almost universal for a century past in England, or by proper conveyance afterwards, before John Hitz became indebted, her property might have been fully protected from the improvidence of her husband, or of herself, as is now the case with the property of all women married within the District of Columbia, since the year 1869, when the statute undertook to make a general provision on the subject. But nothing of the kind was done in this case, and the property was left as it was at the common law. It is not within our power to do otherwise than declare the law as we find it, and this we have attempted to do.

It is a total misconception of the duties of courts of equity to suppose that they should decide upon principles of abstract justice without reference to the controlling effect of the decisions of courts. In the language of an eminent recent writer, Smith's Equity Jurisprudence, page 3: "In the most general sense, equity is synonymous with natural justice. But equity, as contradistinguished from law, and as administered in our courts of equity, has a much narrower and otherwise different signification. Many matters of natural justice by the equity jurisprudence of this and every other civilized nation, are left to be disposed of *in foro conscientiae*, from the difficulty of framing any general rules to meet them, and from the mischief and inconvenience which would arise from attempting judicially to enforce such duties

as charity, gratitude and kindness, or even positive engagements, where they are not founded on a valuable consideration, or, at least, on what is deemed a good consideration.

* * * * *

“The truth then appears to be this : first, that a large portion of natural equity is left to be administered *in foro conscientiae*; because in addition to the difficulty of propounding precise rules applicable to all cases, a greater detriment and inconvenience to the community would ensue from attempting to enforce it in the public courts, than from leaving it to the decision and the power of conscience, and to the various motives by which mankind are ordinarily influenced.”

The duty of a court of equity is performed when it decides in accordance with well-established principles, and decisions based upon the existing state of the law must be just, since the law is justice.

Mr. Chief-Justice CARTER dissented, saying in substance :

I dissent from the conclusion of the court. I do not propose to give my reasons in detail, but merely wish to record my vote against this great wrong.

The doctrine of vested rights has no application to this case ; before this debt was contracted these creditors were advised by the law that they could not touch this estate.

“*In the District the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage, in any other way than by gift or conveyance from her husband, shall be as absolute as if she were unmarried, and shall not be subject to the disposal of her husband, nor be liable for his debts.*” R. S. D. C., 727.

There is no mistaking the language of the law. It shall be absolutely hers ; it shall not be subject to his debts, and it speaks of *all* her property, whether acquired antecedent to marriage or during marriage. He who runs may read.

Was this law constitutional? The subject has been treated as though Hitz had purchased this property ; as though Con-

gress had no power over the institution of marriage in this particular ; as though they were legislating about property purchased instead of the conditions of a married life. A good reply to that, is that all the property that Hitz obtained here is created by law. He has no deed for it ; he never entered into any contract for it ; she did not even own it when he married her, and all the title that he has is a title created by law, a title created by the same authority that qualifies it.

Legislation has laid its hand upon everything connected with the institution of marriage. It divorces husband and wife ; it partitions the property of the one to the use of the other ; it legislates as to the offspring begotten by the marriage, and why may it not declare inviolate the rights of the parties to it ? and that is all that this statute does. It simply declares that a creditor's execution shall not reach the wife's property for the husband's debts. Why may not the law declare this ? It is all the time declaring where executions shall run and where they shall be withheld : First, they shall run against the person. Then they withhold it from the person. Then it shall run against a portion of the property, and not against another portion. Why not in this instance ? It is a part of the law of the remedy, and it has always been held that the law maker has the power of defining the remedy.

If it be, as has been said, a vain avowal that the husband never claimed the rights of a husband in this property, yet there is another feature in this case which should be conclusive. Mrs. Hitz went to Europe, leaving her husband here. When she came home she found one piece of her patrimony conveyed to this bank, and found them in pursuit of another. She advised with counsel and it resulted in her saying, "I will execute a deed for this house if you will divorce yourself from the rest of my property and any claims to it." They consented, and she executed a deed. One dollar was denominated as the consideration, and it is said that the real consideration cannot now be shown. I doubt this. The real consideration can always be shown where there is a nominal recital for a consideration in a deed. So that the

wife having bought all the title in curtesy of her husband, when his creditors come into court demanding her property for his indebtedness, she can very well reply, "I have bought out all his interest. For he agreed to acquit the rest of my estate when I conveyed the house, and that conveyance was the consideration for the acquittal."

But aside from these circumstances, I cannot give my consent to a repealing of the statute, for if the statute is constitutional, and, as against these creditors, I have no doubt of it, it is conclusive of this controversy.

The Chief Justice and Associate Justices Haguer and James sat in this case.

DENNIS FERRY ET AL. vs. CHARLES A. LANGLEY ET AL.

IN EQUITY. No. 6963.

§ Decided March 21, 1881.

§ The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

Testator devised a house and lot to his daughter, E. F., "in trust for the benefit of her children, without particularizing them by their names. A like devise in trust was made to each of three other daughters. He then devised a house and lot to his daughters, E. F. and M. L., "in trust for the benefit of *their* children." The will then declared: "In the above devises and bequests that I have made I wish it to be understood that my desire is that the property so named and designated, be held in trust by the persons so named as trustees until the youngest child in each family shall become of age, when it shall be conveyed to them as tenants in common." There was no evidence as to the value of the respective properties, nor as to how many children there were in each family, nor what advances had been made to them by the testator in his lifetime. *Held*, That, in the absence of this evidence, by the assistance of which the court might have decided differently, and guided only by the face of the will to discover the intention of the testator, the devise to E. F. and M. L. must be construed as meaning that they were to take as trustees for two families or *groups* of children, and that each group took one-half of the devise.

STATEMENT OF THE CASE.

Appeal from a decree of the Special Term dismissing plaintiff's bill.

The case arose upon the construction of the following will:

"In the name of God, Amen, I, Joseph Edwards, of the

city of Washington, District of Columbia, being sick and weak in body, but of sound mind, memory and understanding, considering the certainty of death, and the uncertainty of the time thereof, and being desirous to settle my worldly affairs, do make and publish this, my last will and testament, in manner and form following, that is to say : That after my just debts and funeral expenses are paid, I devise and bequeath as follows : I give and bequeath to my son Edward Edwards, in trust for the benefit of his children, the two houses and lots on which they stand. [Described.]

“I give and bequeath to my daughter, Isabella Keiber, in trust for the benefit of her children, all and every part of a tract of land lying and being in the county of Montgomery. [Described.]

“I also give and bequeath to my daughter, Isabella Keiber, in trust for the benefit of her children, the two houses and lots on which they are erected fronting on an alley, in square number 163.

“I give and bequeath to my daughter, Martha Diggs, in trust for the benefit of her children, the two frame houses and lots on which they are erected. [Described.] Also, I give my daughter, Martha Diggs, in trust for her children, a house and the lot on which it is erected. [Described.]

“I give and bequeath to my daughter, Eliza Ferry, in trust for the benefit of her children, the brick house and lot on which it is erected. [Described.]

“I give and bequeath to my daughter, Mary Langley, in trust for the benefit of her children, the brick house and lot on which it is erected. [Described.]

“I give and bequeath to my son, Edward Edwards, in trust for the benefit of John, Charles, Mary and Hannah Ferry, children of my deceased daughter, Sarah Ferry, the house and lot on which it is erected. [Described.]

“I give and bequeath to my daughters, Eliza Ferry and Mary Langley, in trust for the benefit of their children, the house and lot on which it is erected, fronting on L street, house No. 1428, in square 216, being the next house west of the one bequeathed to F. Edward Edwards, in trust for his children.

“In the above devises and bequests that I have made, I wish it to be understood that my desire is, that the property so named and designated, be held in trust by the persons so named as trustees, until the youngest child in each family shall become of age, when it shall be conveyed to them as tenants in common.” * * * * *

The bill asserts that the children of Eliza Ferry and Mary A. Langley, under the last devise contained in this will, take the property mentioned therein *per capita* and not *per stirpes*; the defendants maintained the contrary. The cause was heard on bill and answer.

ANDREW B. DUVALL for plaintiffs.

Whether the devisees take *per capita* or not depends upon whether they take in their right or by representation, whether the word is a word of purchase or limitation. 2 Redf. Wills, 256, note.

“Children” is naturally a word of purchase and is never converted into a word of limitation unless absolutely necessary to effectuate the intention of the testator. Roper, 69-70. Where there is a devise or bequest to the children of several persons, whether it be “to the children of A and B,” or “to the children of A and the children of B,” they take *per capita* and not *per stirpes*. 2 Jarmen Wills, 111 ; 2 Redf. Wills, 397 ; 3 Bro. C. C., 367 ; 2 P. Wm., 384 , 2 Vern., 705 ; 1 Sandf., 360-4 ; 6 Paige, 89 ; 4 H. & J., 539 ; 5 Cr. C. C., 659.

The learned justice below conceded that this was a devise *per capita* ; but he thought the last clause of the will controlled it, and that clause could only be gratified by holding this to be a devise to the families as such.

But the rule of construction is, if the testator uses in one part of his will words having a clear meaning in law, and in another words inconsistent with the former, the first words are not to be cancelled or overthrown. The doctrine is that the general intent, though first expressed, shall overrule the particular ; *i. e.*, technical words or words of known legal import, shall have their legal effect unless from subsequent

inconsistent words it is *very clear* that the testator meant otherwise. 2. Wms. Ex. (5th Am. ed.), 972-3-8 ; 2 Bligh, 56 ; 6 Pet., 78 ; 1 Jarmen, 413.

If there are words which have no intelligible meaning, or are absurd or repugnant to the clear intent of the rest of the will, they may be rejected. 12 Mass., 548.

According to its apparent grammatical reading, by this last clause each and every devise is revoked ; and when the youngest child in each family becomes of age, each parcel of land mentioned in the will is to be conveyed to them (the youngest child in each family) as tenants in common. Shall language so exceedingly unintelligible, vague and uncertain, control a devise which but for it would be beyond controversy ?

COOK & COLE for defendants :

It is submitted that the proper construction of the language of the clause of the will in question, gives the property to the children of the trustees by families and not *per capita*. 2 Redf. on Wills, 50 ; 1 De Gex. & Smole, 355 ; 16 Beav., 485 ; 11 Wheat., 375 ; 17 Wend., 119 ; 5 Cow., 221 ; 1 Halst. Law, 134 : 5 Dutch., 345 ; 12 Leigh, 350 ; 3 Jones' Eq., 100, 204 ; 11 G. & J., 123 ; 11 B. Mon., 32 ; 27 Penn., 55 ; 40 Penn., 111 ; 45 Conn., 467.

In this case, as in all others, the paramount rule must be applied, that the intention of the testator, to be gathered from the whole will and circumstances, must govern.

The English rule of construction that " a gift to children, grandchildren, or heirs, is equivalent to naming them therein, and of a different intention in the context." 2 Jarmen on Wills (1st Am. ed.), 111, cited with approval in *Raymond vs. Hillhouse*, 45 Conn., 467.

The intention of the testator to give the property in question to the two families equally, is manifest from other portions of the will. Throughout the will he gives to his grandchildren by families, without exception, unless this clause is to be made an exception by construction. In the clause under consideration he gives to two of his daughters, in trust

for their children, dividing them into families by the appointment of trustees. Had the devise been to the daughters, without the addition of the words creating the trust, each would have taken a moiety.

In the last clause the testator provides that the property is "to be held in trust * * * until the youngest child in *each family* shall become of age, when it shall be conveyed to them as tenants in common." If the construction contended for by complainants should be adopted, the property in question could not be conveyed to the beneficiaries until the youngest child in *both families* should become of age, thus taking the clause in question entirely out of the operation of the rule prescribed by the testator.

It may be remarked that there are *nine* children in the family of complainants and *two* in that of the defendants.

Mr. Justice JAMES delivered the opinion of the court.

This case involves the construction of a will in which the testator has made the following provisions:

He gives a certain lot to his daughter, Isabella Keiber, in trust for the benefit of her children; then in a similar manner he proceeds to give certain lots to the mothers of certain groups of children until he comes to these premises:

"I give and bequeath to my son, Edward Edwards, in trust for the benefit of John, Charles, Joseph, Mary and Hannah Ferry, children of my deceased daughter, Sarah Ferry," a certain house and lot.

The provisions which we have specially to consider so as to determine the meaning of one particular clause, are the devises to Eliza Ferry and Mary Langley. There are three which relate to these persons. The first is:

"I give and bequeath to my daughter, Eliza Ferry, in trust for the benefit of her children, the brick house and lot on which it is erected." [Describing.]

The next is: "I give and bequeath to my daughter, Mary Langley, in trust for the benefit of her children, the brick house and lot on which it is erected." [Describing it.]

These are separate devises: one to Eliza Ferry, for her children, and one to Mary Langley, in trust for her children,

the *names* of none of the children being mentioned in either devise.

Next he proceeds to devise to those two persons together, as trustees, in the following terms:

"I give and bequeath to my daughters, Eliza Ferry and Mary Langley, in trust for the benefit of their children, the house and lot on which it is erected, fronting on L street, house No. 1428." [Describing it.]

Last of all he provides that "in the above devises and bequests that I have made, I wish it to be understood that my desire is, that the property so named and designated be held in trust by the persons so named as trustees, until the youngest child in each family shall become of age, when it shall be conveyed to them as tenants in common."

It will be perceived that while the testator gives a particular lot to Eliza Ferry separately for the benefit of her children, and a particular lot to Mary Langley, in trust for the benefit of her children, he conveys only one house and lot to these two mothers jointly for the benefit of their children, without stating in terms how they are to take. The question which we are called upon to decide is whether the children of Eliza Ferry and the children of Mary Langley as groups take one-half, or whether, in case there are nine children in one group and two children in the other, as suggested to us on the argument, they are to take *per capita* each. That is to say, whether the nine shall take one-half and the two one-half, or whether the two shall take two-elevenths, and the nine nine-elevenths.

We have come to our conclusion with some reluctance, but we are not furnished with the means of ascertaining what the effect will be as to equality of distribution. There is a certain spirit manifested in the will of intending to work out justice and equality among all these devisees. If we knew the values of the real estate and knew how many children there are in each of these families, we might be made possibly to come to a different conclusion. But we have nothing but the words of the will. Nor do we know what advances may have been made by the testator to any

of these families. If our construction works out inequality, it is because we do not know the value of the property given to Eliza Ferry, supposing her to be the mother of the nine, or the value of that given to Mary Langley and her children, There may be such inequalities in their values as to make it strictly equal to giving one-half only to the nine children of Eliza Ferry, and other half to the two children of Mary Langley.

We have looked over the whole of this will to find out what was really intended. Now we find one clause giving to Eliza Ferry a house and lot for the benefit of her children, who were evidently looked upon as a group to which this property was given as a provision. The same course was followed in the devise of another house and lot to Mary Langley and her children, whether many or few. The testator has then one more house left, and this he gives to the same mothers for their children, and our conclusion is that he intended to regard them as groups in this instance just as he had done before.

There is one expression which the testator uses which confirms me in that opinion and which I think was taken into consideration by the court: "In the above devises and bequests that I have made, I wish it to be understood that my desire is that the property so named and designated, be held in trust by the persons so named as trustees, until the youngest child in each family shall become of age." He mentions them as families, indicates in that expression that he was providing for them as families; that he looked upon them as families; and he kept them out of possession as an entire family in each case; in all these separate devises and in the joint one alike, he would not allow the property to become vested in them so as to enable them to make partition or to dispose of it until the youngest child should become of age.

Looking, then, at the face of the will, without the aid of any history of the pieces of property, and without any information as to what the testator may have done for the advancement of these families we are led to the conclusion

that his intention was to make provision for group by group, and that he kept them in his mind in that relation, and that this clause which we are called upon to construe means that Eliza Ferry and Mary Langley take as trustees for two groups of children; we are told one of them is nine and the other two; each group takes one-half.

The decree below is affirmed.

McMANUS vs. STANDISH ET AL.

CHILES vs. STANDISH ET AL.

WINDER vs. STANDISH ET AL.

IN EQUITY. Nos. 6382, 6703 and 7011, Consolidated.

{ Decided April 18, 1881.

{ The CHIEF JUSTICE and Justices WYLIE and HAGNER sitting.

1. The Joint Commission established under the treaty of July 4, 1868, between Mexico and the United States, made an award in favor of certain claimants against Mexico. The money having been paid into the United States Treasury, subject to the control of the Secretary of State, one-half was paid to the claimants and the remainder retained, subject to the claims of the attorneys who were conflicting assignees of this moiety of the fund. On a bill filed in this court to settle their equities it was, on a plea to the jurisdiction:
Held, that where the fund is in the Treasury of the United States and the parties claiming it are before the court, the court will take jurisdiction.
2. It is not necessary in such a case that the original claimants before the Commission should be in court if it appear that they disclaim any interest in the moiety in dispute.

STATEMENT OF THE CASE.

These cases, though separate suits in equity, were consolidated by direction of the court and ordered to be heard in General Term in the first instance. The controversy grew out of a dispute between certain of the parties as to their respective shares in a fund in the hands of the Secretary of State.

In 1865, three citizens of the United States, Austin M. Standish, Aaron H. Conrow and Monroe M. Parsons, while traveling in company with each other were robbed and

murdered on the San Juan river, Mexico, by troops connected with the military forces of that government. For the wrongs and injuries thus done, the widows and legal representatives of these persons, Sarah M. Standish, Mary D. Conrow and Stephen K. Parsons, preferred their several claims against the government of Mexico, and caused the same to be prosecuted before the joint commission established under the treaty of July 4, 1868, between Mexico and the United States.

In the prosecution of these claims they employed sundry agents and attorneys, and agreed to pay as fees one-half of any awards that might be recovered, and made assignments to that effect. The claims were successfully prosecuted, and in the year 1875, by the decision of the commission, the following sums in Mexican gold were awarded the parties, viz. :

Standish	-	-	-	-	-	-	-	-	\$42,486 30
Conrow	-	-	-	-	-	-	-	-	50,497 26
Parsons	-	-	-	-	-	-	-	-	50,828 76
									<hr/>
Aggregating	-	-	-	-	-	-	-	-	143,812 32

Of this amount the *one-half* reserved by the claimants was paid them and the remainder which had been assigned to certain attorneys and agents was retained by the Secretary of State of the United States, for distribution to the parties entitled. The agents and attorneys were employed either by Standish, Conrow and Parsons themselves, or by those claiming authority through them to make such employment. After the awards were rendered certain of these agents and attorneys assigned their interest, thus raising questions *inter sese* as to their respective rights and priorities in this moiety of the awards, and the bills were filed for the purpose of settling, by a decree of this court, the equities of the parties and to enjoin the Secretary of State from paying the money over to any of the defendants. There was no dispute as to the moiety of the awards reserved by the original claimants themselves.

The question of jurisdiction being raised :

Mr. Justice WYLIE delivered the opinion of the court.

The Secretary of State, who has the distribution of this fund, under the act of Congress passed for the purpose of carrying out the treaty, has directed that one-half shall be paid to the claimants before the commission—the widows and legal representatives of these three American citizens who were robbed and murdered in Mexico. That half has been paid, and the parties are satisfied. There is now a dispute among the agents and counsel over the other half as to who shall be entitled to it. The money being in the Treasury, subject to the control of the Secretary of State, it has been thought best by the complainant here to make him a party to these proceedings. He has not, however, appeared and answered, but we do not regard that as essential. All the parties who claim any interest in this money are before the court, except the claimants before the commission, who are residents of the State of Missouri. They are made parties, and publication was made to bring them in, but they have not appeared. We have, however, their evidence, and as they make no claim to the fund here, we do not regard them as material parties. Now, with all the parties having any interest in the fund, and the money in the Treasury of the United States, subject by the terms of the act of Congress to the orders of the Secretary of State, the question is, whether the court has jurisdiction.

The cases of *Comegys vs. Vasse*, in 1 Peters, and of *Wylie vs. Cox*, in 15 Howard, and perhaps two or three other cases, have been supposed to bear somewhat upon this question. But in those cases the money was not in the Treasury of the United States. In the case of *Comegys vs. Vasse* it had been paid by the Treasury to one of the parties, and the action was brought in Philadelphia by the other parties to the case—an action for money had and received. Nor in the case of *Wylie vs. Cox* was the money in the Treasury. It had been drawn by the administrator of the estate, and the bill was filed by the attorney claiming

it. There is also another class of cases to which our attention has been called and which are supposed to bear upon this question. We do not think, however, that they have anything to do with it. They are cases which have been decided under the treaty of Guadalupe Hidalgo, between the United States and Mexico in 1848, and the act of Congress which was passed the following year for the purpose of carrying that treaty into effect, and for distributing the funds which might be awarded under that treaty. The 6th section of the act of Congress carrying that treaty into effect, authorized claimants who had not been recognized by the commissioners, and who might assert claims against the fund, to institute their suits within a fixed period. So that all the cases which have arisen under the treaty of Guadalupe Hidalgo must be laid out of the question, because they were provided for by a special act of Congress.

The case of *Lewis vs. Bell*, which was entertained by the Supreme Court of the United States, does not bear upon the question here. The money in that case was in the Treasury, but the law for carrying the treaty with Brazil, there referred to, into effect contained the same provision which was contained in the law relating to the Guadalupe Hidalgo treaty. Indeed it refers in express terms to the 6th section of that act.

The only class of cases that we find which raises the question purely whether litigants may be entertained in this court in regard to a fund in the Treasury of the United States, are cases which have arisen under the treaty with France on the 4th of July, 1831, and the act of Congress of the following year which provided for the carrying of that treaty into effect. Neither that act nor that treaty contained any authority to the courts to take jurisdiction in regard to litigation between the claimants over the fund awarded. But a number of cases have arisen under that treaty, and have been entertained both by this court and by the Supreme Court of the United States.

I will refer in the first place to the case of *Ridgway vs. Hays*, decided by this court and reported in 5 Cranch Circuit

Court Reports, page 23. That was a controversy which arose under the French treaty, and the court took jurisdiction because it had the parties before it. The fund was in the Treasury. The officers of the Treasury and the Department—the Secretary of the Treasury and the Treasurer himself—were made parties to that suit. They appeared and entered a plea, to the jurisdiction. It was by way of answer. They said, notwithstanding their plea to the jurisdiction, if the court decided to take jurisdiction, they would respect the decision of the court in the distribution of the fund. There is another case, the case of Dutilli's administrator *vs.* Coursault, also reported in 5 Cranch Circuit Court Reports, 349, in which there is a very interesting and very able discussion of this subject by the late Chief Justice Cranch. He referred to very high authorities there, and the opinion in that case is well worthy of consideration. It is a case not cited by counsel on either side in the argument, but it followed soon after the previous case of Ridgway *vs.* Hays. And the same questions arising in both cases must have been fully considered by that court after this double discussion, and they were decided in favor of the jurisdiction of the court. There is another and an analagous case, not arising under the French treaty, but under a treaty between the United States and Great Britain—the case of Pemberton *vs.* Lockett et al., reported in 21 Howard, 257–260. The Commission sat in that case in London and made an award in favor of an American citizen for a considerable amount. The money having been paid by the British Government to our Government, was in the Treasury here to be paid to the claimants. We had no act of Congress upon this subject that I have been able to find as to the distribution of the award. The gentlemen who had been counsel in the case for the claimant filed a bill in this court praying to be allowed their fees out of the fund. The court took jurisdiction of the case, the parties being here, and decided in favor of the counsel. The case was taken to the Supreme Court of the United States, and the decree below was reversed, but it was upon the ground that the counsel had

no standing under the circumstances of that case; the treaty providing that each government should be represented by its selected agents, and that each government had been so represented by its chosen agent.

I think, also, that our own practice—the practice of this court as far back as my memory goes, has been a uniform course of decision in favor of the jurisdiction of the court, where it had the parties here before it, and beyond that point we need not go, and we do not propose to go in this case. We do not wish to intimate an opinion, or an impression even, that if the fund is in the Treasury, and if the party is not here, that that would make any difference. That is not the question to be decided in the cases now under consideration. We are not now required to go beyond the fact that the fund is in the Treasury here, and the parties claiming the fund are before the court, and this we hold gives us jurisdiction of the case.

[The court then went into the merits of the case, and, reviewing the facts, decided against the plaintiffs and dismissed the bill.]

JESUP MILLER and MILTON T. SOUTHARD argued in support of the jurisdiction.

J. J. JOHNSON, S. S. HENKLE and G. B. WHITE, *contra*.

THE UNITED STATES *vs.* JOSEPH NEVERSON ET AL.

CRIMINAL DOCKET. No. 13,282.

{ Decided June 7, 1880.

{ The CHIEF JUSTICE and Justices WYLIE and MAC ARTHUR sitting.

1. Under Section 1033 R. S. U. S., providing for the delivery to the defendant of a copy of the indictment and a list of the jurors and witnesses two entire days before the trial begins, the trial is to be considered as beginning when the jury is made up and sworn; and not when the prisoner is arraigned; and it would seem that Sunday may be included as one of the two days.
2. The pendency of a prior indictment to which a plea of not guilty has been entered and upon which plea issue has been joined, is no bar to an arraignment and trial upon a second indictment in the same court for the same crime.
3. A delivery to the defendant, after the trial begins, of a list containing the name of a witness who will be called in behalf of the prosecution,

is not sufficient, under Section 1033 R. S. U. S., to entitle the prosecution to use such witness on the trial, even though the court should adjourn the trial for three days in order that the defendant may not be surprised.

4. But when such evidence has been admitted the defendant, if he complains of it, must set out in the record what the evidence was; for, if it was immaterial or unfavorable to the prosecution, the ruling of the court below in permitting the witness to testify will be no ground for granting a new trial; and a mere statement in the record that the evidence, without setting it out, was "*in behalf* of the prosecution," is not sufficient to inform the court of the nature of the evidence.
5. There is no particular limit as to the time anterior to the homicide when evidence of threats made by the defendant against the deceased will be excluded. The judgment of the court on such a question is to be guided by the circumstances of the case.
6. Where the credibility of a witness is impeached by the opposite party, the witness' prior declarations may be given in evidence to show the consistency of his statements.
7. An exception, based upon the court's permitting certain questions to be asked the defendant and requiring their answer will be overruled when no harm appears to have been done the defendant by the answer.
8. Where an offer of proof is made and rejected, the party complaining must set out on the record the facts which he proposed to prove in order that the court may see whether he has been prejudiced by the rejection of his offer.
9. Where, on cross-examination, a witness is asked a question not collateral but material to the issue, the answer is not conclusive upon the party asking it, and he may offer evidence to contradict it.
10. It is no ground for a new trial that the justice trying the cause erroneously ruled certain persons competent as jurors if it appears that they did not sit on the jury, and that the defense in challenging them did not exhaust their peremptory challenges, but had others to spare when the jury was completed.
11. The different grades of homicide distinguished and briefly defined.
12. Malice is evidenced by previous threats or grudges, lying in wait or by poison. It is implied when the killing is done, in an attempt to rob or commit some other felony.
13. The felonious purpose to kill need only exist for a moment before striking the blow.
14. On an indictment for murder against three, all may be found guilty, although only one or two dealt the blow, if the others were present, aiding and abetting—in sympathy with the deed—watching, or otherwise aiding while near enough to give assistance.
15. The word accomplice signifies in law a "guilty associate in crime."
16. Whether a witness is an accomplice in the crime charged in the indictment, or only an innocent witness of the transaction, is a question to be decided by the jury from the evidence in the case.
17. If a party was present at a murder, but took no part in it, nor endeavored to prevent it, nor apprehended the murderers, but otherwise was not concerned in its commission, and was not aiding and abetting at the murder, nor ready to afford assistance if necessary, such presence will not of itself render him either principal or accessory to the murder, nor an accomplice therein.
18. Such a person if believed by the jury to have been merely an innocent witness of the transaction, stands before them like any other witness who chanced to have seen a crime committed.
19. The degree of credit to be given an accomplice is a matter exclusively within the province of the jury; they may, if they see fit, act upon his evidence, even in a capital case, without any confirmation of his

prisoners were arraigned upon the first, and pleaded not guilty; upon which plea issue was joined. Subsequently they were arraigned upon the second indictment and, notwithstanding their objections to pleading to the same during the pendency of the prior indictment, were required to plead thereto; whereupon they pleaded not guilty. It was upon this latter indictment that the defendants were tried. The indictment was in six counts. The first, second, and sixth charging the killing with a stone. The third and fourth charged the killing by kicking and beating. The fifth charged the killing by instruments unknown.

Numerous exceptions were taken at the trial (which lasted nearly three weeks) the substance of which appear in the opinion of the court. At the conclusion of the testimony and arguments of counsel, the court (Justice Hagner) delivered the following charge to the jury as set out in the bill of exceptions:

“Homicide is distinguished into justifiable, as execution by a sheriff, killing a mutineer, rioter, etc.; excusable, as by accident, such as an axe flying off the handle, or in necessary self-defense; and felonious, which is subdivided as follows: First, manslaughter, committed in sudden affray or by carelessness; inflicting death while doing a lawful act unlawfully; all without malice; second, murder, which is killing with malice aforethought, either expressed or implied. Malice is evidenced by previous threats or grudges, lying in wait or by the use of poison. It is implied when the killing is done, in an attempt to rob or commit some other felony. The felonious purpose to kill need only exist for a moment before striking the blow to constitute the crime.”

“On this indictment all the prisoners may be found guilty, although only one or two dealt the blow, if the others were present, aiding and abetting—in sympathy with the deed—watching, or otherwise aiding while near enough to give assistance.

“The word accomplice signifies, from its derivation, in law, ‘a guilty associate in crime.’ Whether the witness Benjamin Johnson is an accomplice in the crime charged in

the indictment or only an innocent witness of the transaction is a question to be decided by the jury from the evidence in the case. If the jury should believe from evidence that Johnson was present at the murder of Hirth, but that he took no part in it, nor endeavored to prevent it, nor apprehended the murderers, but otherwise was not concerned in its commission, and was not aiding and abetting at the murder, nor ready to afford assistance if necessary—such presence would not, of itself, render him either principal or accessory to the murder, nor an accomplice therein.

“If the jury believe from the evidence that he was merely an innocent witness, then he stands before the jury like any other witness who chanced to have seen a crime committed. In this event his evidence comes before the jury like that of any other witness, and is to be weighed by them according to the usual rules for testing the value of evidence, as the manner and appearance of the witness on the stand, his intelligence, the reasonableness of his story and his interest in the matter in controversy.

“If the jury shall believe from the evidence that the witness Benjamin Johnson was an accomplice in the crime, that is, that he was a participant in its commission, either by direct act or by having given or been ready to give aid and comfort and guilty assistance to the criminals, then the court instructs the jury that there is no rule of law declaring that a jury ought not to believe his evidence upon the ground of his being an accomplice unless his testimony is corroborated by other evidence. That the testimony of accomplices is admitted from necessity; it being often impossible to bring the principal offenders to justice, without having recourse to such evidence, and the jury may, if they see fit, act upon the evidence of an accomplice even in a capital case without any confirmation of his statement.

“That the degree of credit which ought to be given to the witness Johnson (if the jury shall believe from the evidence that he was an accomplice), is a matter exclusively within the province of the jury.

“The court advises the jury that if they shall believe from

the evidence that Johnson was an accomplice in the murder, the jury should not convict the prisoners upon the testimony of Johnson alone and without corroboration. That such corroboration need not extend to the whole testimony of the witness (since if this were so it would not be necessary to call him at all), but must relate to some portion of his testimony which is material to the issue of the prisoners' guilt. That proof that he told the truth in relation to irrelevant and immaterial matters, which were generally known, would not in itself be sufficient corroboration, nor that he had told the truth in stating that Hirth was knocked down on P street, and was put to death on the night of January 7, 1880. That the corroboration should be of such and so many parts of the narrative of the accomplice as may reasonably satisfy the jury that he is telling the truth, without restricting the confirmation to any particular points and leaving the effect of such confirmation to the consideration of the jury."

As to reasonable doubt and presumption of innocence the court read in full section 29 of 3 Greenleaf's Evidence, 13th edition, and note 2.

"As to presumption of good character, the prisoners are entitled to the presumption of having sustained good characters up to the time of the alleged murder, and this presumption remains in their favor unless the jury shall believe from the evidence that they in fact were not entitled to such reputation. The evidence of previous good character offered in behalf of the prisoner Pinn, if believed by the jury, should be duly weighed by the jury as a fact in his favor.

The court further instructed the jury that under the law, the jury are the exclusive judges of the weight and effect of the evidence, and that they are authorized to believe or disbelieve one or another of the witnesses at their discretion.

"Where there are several defendants, as in this case, and an accomplice testifies to their several acts, testimony corroborating him as to one or two of the defendants is not necessarily corroborative as to the others; and, therefore, if the jury find from the evidence that Johnson was such an accomplice, then the testimony corroborating him as to one

or two of the defendants is not necessarily corroborative of the guilt of the others."

The jury found a verdict of guilty against all three of the defendants. The case then came to the general term for hearing on the exceptions taken at the trial.

RANDOLPH COYLE and H. H. WELLS, JR., for Bedford and Queenan.

THOS. MILLER and J. MAURICE SMITH for Pinn.

In support of the first, fourth and tenth exceptions counsel for defense cited the following authorities :

State *vs.* Hartigan, 19 N. H., 248; Friar *vs.* State, 3 Howard, (Miss.), 422; State *vs.* McLendon, 1 Stewart, (Ala.), 195; Driskell *vs.* State, 45 Ala., 21; Smith *vs.* State, 8 Ohio, 297; Foster's P. C., 229, 230; State *vs.* Aaron, 1st Southard (N. J.), 231; State *vs.* Montgomery, 68 Mo., 296; Brewster *vs.* State, 26 Ala., 107; Smith's Com. on Statutes, 685-6; Bill *vs.* State, 29 Ala., 34; Louisiana *vs.* Guirdy, 27 La. An., 206; State *vs.* Green, 66 Mo., 681; State *vs.* Johnson, Walker, 392; 1st Chitty Crim. Law, 405; 4 Hargrave State Trials, 476; U. S. *vs.* Curtis, 4 Mason, 232; U. S. *vs.* Dow, Taney Dec., 34. The cases in Illinois, which at first glance would seem to support the position of the court below will be found on examination to be founded on the statute of that State between which and that of the United States there is no analogy. These cases will be found in 14 Ill., 436; 70 Ill., 171, and 74 Ill., 144.

For the second exception the following authorities were cited: Hilliard, N. J., 389 *et seq.*; 1 Bish. Crim. Prac., 801, and cases cited; 1 Wharton Crim. Law, 531; U. S. *vs.* Dixon, 1 Cr. C. C., 414; 1 Chitty Crim. Law, 437, and cases there cited; State *vs.* Barnes, 32 Me., 530; 1 Bish. Crim. Prac., 813, and cases cited; Com. *vs.* Cook, 6 Serg. & Rawle, 577; Com. *vs.* Dunham, Thatcher's Crim. Code, 514; Com. *vs.* Clue, 3 Rawle, 498; Com. *vs.* Wheeler, 2 Mass., 172; Lindsay *vs.* Com., 2 Va. Cases, 345; Wirtham *vs.* Com., 5 Rand, 669; Walton *vs.* State, 3 Sneed, 687; Sec. 1024 Rev. Stat. U. S.

In support of the third and fifth exceptions no authorities

were cited. In support of the sixth, seventh and eighth the following were cited: *Beauchamp vs. State*, 6 Blackf., 299; *Wh. Crim. Law*, Vol. 1, p. 821; *Robb vs. Hackley*, 23 Wend., 50; *Dudley vs. Bolles*, 24 Wend., 464; *U. S. vs. Holmes*, 1 Clifford, 98; *Head vs. State*, 44 Miss., 731; *State vs. Vincent*, 24 Iowa, 570; *Ellicott vs. Pearl*, 1 McLean, 206; *U. S. vs. Wilson*, Bald., 78; *Com. vs. Jenkins*, 10 Gray, 485; *State vs. George*, 8 Ibid, 324; *Butler vs. Trunslow*, 55 Barb., 293; *Munson vs. Hastings*, 12 Vt., 346; 1 Phill. Ev., 213-230; 1 Stark Ev., 148-187; *Gibbs vs. Lansley*, 13 Vt., 208; *King vs. Parker*, 13 Doug., 242; *Robertson vs. Caw*, 3 Barbour, 410; 10 Pet., 412-440; *Brazier's Case*, 1 East P. C., 444; 2 Stark. N. P., 242; *Conrad vs. Griffey*, 11 How., 480; *People vs. Finnigan*, 1 Parker C. C., 147.

For the ninth exception: *Lohman vs. People*, 1 Comst., 379; *Howell vs. Com.*, 5 Gratt., 664; *People vs. Rector*, 19 Wend., 569; *Clemintine vs. State*, 14 Mo., 112; *Barnes vs. State*, 19 Conn., 398; *People vs. Blakely*, 4 Parker, 176; *People vs. Lohman*, 2 Barb., 216; *Wh. Crim. Law*, sec. 809; *People vs. Herrick*, 13 Johns (N. Y.), 82; *Cooke's Case*, 4 State Trials, 748; *Salkirk*, 153.

For the eleventh exception: *Roscoe's Crim. Ev.*, 96, note and case cited; *Drew vs. Wood*, 26 N. H., 363; *Folsom vs. Brown*, 23 N. H., 114; *Martin vs. Farnham*, 25 N. H., 195; *Hutchinson vs. Wheeler*, 35 Vt., 330; 9 Ga., 121; 6 Parker C. C., 258; *Atwood vs. Welton*, 7 Conn., 66; *Morgan vs. Fries*, 15 Barb., 352; *Stafford's Case*, 7 Howell's State Trials, 14; 2 Brod. & Bring.; 2 Phill. Ev., 952; *Yewin's Case*, 2 Camp., 637.

For the twelfth exception: *Little vs. Comw.*, 5 Gratt., 921; *Mitchum vs. State*, 11 Ga., 615; *Frank vs. State*, 27 Ala., 37; *Monroe vs. State*, 5 Ga., 85; *Com. vs. Rowe*, 105 Mass., 590; *Chaney vs. State*, 31 Ala., 342; *Birdsong vs. State*, 47 Ala., 68; 1 Green's Crim. R., 729; *R. vs. Cowhurst*, 1 C. & K., 370; *R. vs. Smith*, 2 C. & K., 207; *W. S. vs. Craig*, 4 Wash. C. C., 729; *People vs. Vernon*, 35 Cal., 49; *State vs. Patterson*, 63 N. C., 520; *State vs. Vincent*, 24 Iowa, 570; *Dillon vs. People*, 8 Mich., 357.

For the fourteenth and fifteenth exceptions no authorities were referred to.

GEORGE B. CORKHILL, for the United States, cited:

In respect of the first exception: 1 Bish. Crim. Law, sec. 1014; 5 Eng., 607; 3 Litt., 284; 3 Wh. Crim. Law, sec. 3153 *et seq.*; U. S. *vs.* Curtis, 4 Mason, 232.

As to the second exception: 1 Bish. Crim. Law, sec. 1014, and cases cited; Wh. Crim. Pl. & Pr. (8th ed.), §§ 390, 372-3, 452 and cases cited.

As to the third exception: 6 Parker, 209; People *vs.* White, 55 Barb., 606; 5 Parker, 39; 22 Wis., 441; 25 Wis., 384; Wh. Crim. Pl. & Pr. (8th ed.), § 297; Wh. Crim. Law (8th ed.), § 540.

As to the fourth exception: People *vs.* Hill, 26 Mich., 496; Smith *vs.* State, 8 Ohio, 294; Gates *vs.* People, 14 Ill., 436; Perry *vs.* People, 14 Ill., 498; 74 Ill., 144.

As to the sixth, seventh and eighth exceptions: Wh. Law of Ev., § 570; 11 How., 490; Com. *vs.* Bosworth, 22 Pick., 397; Com. *vs.* Wilson, 1 Gray, 337; Beauchamp *vs.* State, 6 Blackf., 299; McAleer *vs.* Hirsey, 35 Md., 463; Stockdale *vs.* Cullosan, 35 Md., 326; Smith *vs.* Cook, 35 Md., 134; R. R. Co. *v.* Andrews, 39 Md., 354; Roscoe's Cr. Ev., 108; 2 Phill. Ev., 445 (9th ed.)

As to the tenth exception: People *vs.* Hill, 26 Mich., 496. And as to the eleventh: Wh. Ev., 559; Rex *vs.* Rudge, 2 Perk. N. P. Cases, 232; 4 Phill. Ev., 750, and *Ib.*, 430, note 386.

Mr. Justice WYLIE delivered the opinion of the court.

On the 5th of February last these three defendants were indicted on a charge of murder. On the same day they were arraigned and pleaded not guilty. The court sat for the trial of the case on the 9th of February, and on that day eight jurors were secured and sworn in. On the next day, the 10th of February, the jury was completed and the trial proceeded with; it lasted the rest of the month, and on the

1st of March the jury brought in a verdict of guilty as to all.

The case has been heard upon a large number of exceptions covering a large variety of questions.

The first exception, after setting out the indictment, proceeds as follows:

“ Upon which said indictment the district attorney proposed that the said defendants should be arraigned, whereupon they objected to such arraignment, because they had not two entire days before that time been served with a copy of the indictment, numbered 13,282, which objection the court overruled, and they were arraigned accordingly, to which ruling of the court the defendants then and there excepted,” &c.

The act of Congress on this subject, section 1033, Revised Statutes, U. S., is in these words:

“ When any person is indicted of treason, a copy of the indictment and a list of the jury, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each juror and witness, shall be delivered to him at least three entire days before he is tried for the same. When any person is indicted of any other capital offense such copy of the indictment and list of jurors and witnesses shall be delivered to him at least two entire days before the trial.”

This statute is the only law we have upon the subject. In this case it seems by the record that on the day the indictment was found, which was the 5th of February, the prisoners were arraigned and pleaded not guilty. They were not again brought into court until the 9th of February, when the making up of the jury began, but was not completed until the next day, the 10th, and the first question which we are called upon to decide is whether the defendants had had delivered to them a copy of the indictment and a list of the jurors and witnesses two entire days before the trial began.

These lists were delivered to them on the 5th of February, the day of their arraignment. Under the English statute

of 7th William III, chapter 3, the courts of England have decided that the prisoner was entitled to a copy of the indictment before his arraignment, and if that were the law in this country the defendants were not served in time. But the language of that statute is very different from ours. In the first section of the statute of William III, it is there declared that all persons indicted for treason or misprision "shall have a true copy of the whole indictment, but not of the names of the witnesses, delivered unto them or any of them five days at the least before he or they shall be tried for the same, whereby to enable them and any of them, respectively, to advise with counsel thereupon to plead and make their defense," &c.

Under that statute the English courts have held that as the copy of the indictment was to be served upon the prisoner five days before the trial, "whereby to enable him to advise with counsel thereupon to plead and make his defense," the copy must be served five days before the indictment. But our statute contains no such provision. It simply declares that a copy of the indictment and of the jurors and of the witnesses shall be served two entire days before the trial.

In the case of the United States *vs.* Curtis, 4 Mason's Reports, 232, the court (Judge Story) was perfectly clear that it was sufficient if the copy was delivered two days before the cause is tried by the jury, and not before the party is arraigned on the indictment. It is very true that Judge Taney in another case decided otherwise. He held, agreeably to the decisions of the English courts under their statute, that the copy of the indictment ought to be served two days before the arraignment. In the conflict between these two high authorities the court is left to its own best judgment, and as the language of the statute seems to be plain, we must hold that the service of these copies was in time, having been made two days before the trial, and the trial does not begin until the jury is completed and sworn, which in this case was on the 10th of February. We see no error, therefore, in the ruling of the court below upon this point.

In regard to the second exception, it seems that on the 2d of February, only three days before the finding of the indictment, upon which the defendants were tried, a prior indictment (No. 13,263) had been found against them for the same crime. To this indictment they had on the same day—the 2d day of February—been arraigned and had pleaded not guilty, with which plea issue had been joined by the Government. The district attorney, however, without proceeding upon that indictment, had a new one found—the one upon which they were tried. When they were called upon to plead to this last indictment, they objected, as the exception sets out, “to being compelled to plead to said second indictment, and to proceed to trial thereon until the issue joined on the said indictment numbered 13,263 was disposed of, which objection was by the court overruled, and the defendants were required to plead to said second indictment, and to proceed to trial thereon, and did plead not guilty thereon, to which ruling of the court the defendants excepted,” &c.

We see nothing in this exception on which to grant a new trial. In the case of John Swan and Elizabeth Jeffries, reported in Foster’s Crown Law, 104, the objection was made that a prior indictment had been found against the defendants. But the court overruled the objection, saying: “The court is of opinion that the charge in the bill last found must be answered notwithstanding the pendency of the former, for *auterfois arraign* is no plea in this case. Perhaps the bill last found is better adapted to the nature of the case than the former, and the king’s counsel must be at liberty to prosecute in such manner as may best answer the ends of public justice. But at the same time the court must take care that the prisoners be not exposed to the inconvenience of undergoing two trials for one and the same fact.”

This principle seems to us to be applicable to the present case and to be conclusive against this exception, and it is accordingly overruled. The court will take care that the prisoners be not exposed to the jeopardy of two trials for one and the same fact.

The third exception is based upon the refusal of the court to grant a motion that the counsel for the government should be required to elect on which particular count of the indictment they would proceed to trial. The indictment in this case contained six counts. The first, second and sixth charging the killing with a stone; the third and fourth charging the killing by kicking and beating, and the fifth charges the killing by instruments unknown. We are of opinion that there was no ground for such a motion. Where an indictment contains several counts, the prosecution will not be compelled to elect on which count they will ask conviction. *State v. Canterbury*, 8 Foster's New Hampshire Reports, 195; Archbold's Criminal Pleading (Pomeroy's 8th edition), 292, where in the latter authority it is said there is no objection to stating the same offence in different ways, in as many different counts of the indictment as you may think necessary, even although the judgment on the several counts be different, provided all the counts be for felonies or all for misdemeanors.

The fourth exception, which is of more serious import, begins by setting out that on the 5th day of February, the prisoners had been served with a long list containing the names and addresses of the witnesses for the Government, and that on the next day, the 6th of February, a supplemental list consisting of the names and places of abode of two more witnesses was served. The names on this second list were W. R. Speare and William Dangerfield, and the question is, whether the prisoners were served with this list two full days before the trial. Now, the sixth of February was Friday, and the statute requires, as we have seen, that the defendant shall be served two entire days before the trial. The defendant's counsel contend that only Saturday is to be counted, Sunday being *dies non juridicus*, and that as the trial *began*, as they contend, on Monday, the fractional part of that day is not to be reckoned, so that they were not served, as counsel contend, two entire days before trial with the list of these two witnesses. As the trial, however, is to be regarded as beginning on the next day, viz., on Tuesday

the 10th, when the jury was completed, it is clear that they were served two entire days before the trial began.

But even had the trial begun on the 9th, the list would have been served in time, for the maxim *dies Dominicus non est juridicus* does not apply to matters of this sort. The Lord's day, *dies Dominicus*, is a day upon which the courts do not sit, it is true; although in early times the English ecclesiastical courts sat on Sunday, and only ceased to do so when Parliament interfered. All, therefore, that is intended by this maxim is that the courts do not do business on Sunday. But other business may be done on that day, unless forbidden by the statute, and if, therefore, the statute providing for the delivering of this list does not prohibit Sunday from being counted as one of the days, there is nothing to prevent it being so counted.

Upon this point I will read from Foster's Crown Law, page 230, *note*, where, in commenting on the English statute on the same subject, the writer says: "Upon the commission which sat in Savoy and in the north for the trial of the rebels in the year 1746, the five days, as I have already said, were likewise exclusive of an intervening Sunday; that not being thought a proper day for the prisoner's advising with his counsel or preparing for his defense. It was so ordered upon a like commission in the north in the year 1716 for greater caution and to obviate all objections. *But the statute doth not require it.*"

This question, however, does not arise in this case, as the trial is to be regarded as beginning on the 10th of February, when the jury was completed, and the list was, therefore, delivered in ample time.

But there is a more serious question raised by this fourth exception. It appears that on the 14th of February, and after the trial had been going on for some days, another list was served upon the defendants, and this third list, while containing the names of Dangerfield and Speare, had in addition the name of W. Pettis. The third notice as to Dangerfield and Speare was doubtless given for greater caution, but W. Pettis was a new witness, of whom no notice

had been given before the trial began. I will read that portion of the exception which states the facts in regard to this witness.

“ And the prosecution then and there proposed to examine the witnesses on the last named list on behalf of the United States, but the court decided that although the affidavit of the United States attorney disclosed a sufficient excuse for not having served the names of the witnesses on the defendants two legal days before the commencement of the trial, yet that the said supplemental list had not been served on the defendants two entire days before the said 16th day of February, 1880, and hence the said witnesses could not be examined on said 16th day, but that the court would allow them to be examined on the 18th of February, and the court adjourned on February 17th until February 18th, the United States having no further witnesses in readiness, on which 18th day of February, 1880, the prosecution called, to maintain the issue on its part joined, and before the defendants had presented their testimony on their behalf, W. R. Speare, William Dangerfield, and W. Pettis, as witnesses on behalf of the prosecution; whereupon the defendants objected to the said witnesses, and each of them, being sworn, because their names and places of abode had not been served upon them two entire days before the trial, which objection was by the court overruled; and the said witnesses were sworn and testified in chief on behalf of the prosecution; to which ruling of the court the defendants excepted,” &c.

Now, as to Dangerfield and Speare, the original notice of February 6th was sufficient. But as to Pettis, we are of opinion that the notice was not sufficient, it not having been given until after the trial began; but that is hardly decisive of the fate of the exception. The bill of exceptions merely sets out that these witnesses were sworn. Now, they were incompetent witnesses, but what did they swear to? The testimony might have been favorable for the defendants; it might have been a matter wholly immaterial, and the statute refers to witnesses who are to be called to support the indictment. Now, an incompetent witness may be improperly

admitted to testify, but if his testimony is immaterial, or if it has been unfavorable to the other side, it is no ground of reversal. In the case of the Railroad Company *vs.* Smith, 21 Wallace, 255, incompetent testimony had been received in the court below, but had not been set out in the bill of exceptions, and the Supreme Court said, page 261: "For aught that we can know the witness may have answered that he was unable to state what injury or damage, hindrance or delay, was occasioned to the company in the running of the road by the defective character of the bridge, or what number of hands were employed or would have been necessary if the bridge had been properly constructed. We cannot, therefore, see that any harm resulted to the defendant from the exclusion. Whatever may be the rule elsewhere, to render an exception available in this court, it must affirmatively appear that the ruling excepted to affected or might have affected the decision of the case. If the exception is to the refusal of an interrogatory not objectionable in form, the record must show that the answer related to a material matter involved; or, if no answer was given, the record must show the offer of the party to prove by the witness particular facts, to which the interrogatory related and that such facts were material. Such has been the decision of this court in several cases, and was distinctly affirmed at the present term in the case of Packet Company *vs.* Clough."

And in that case, which is to be found in 20 Wallace, 542, Judge Strong, delivering the opinion of the court, said (I read from page 542):

"The last assignment of error is the rejection of the deposition of Turner. Of this it is sufficient to say that we have not before us either the deposition or any statement of what it tended to prove. We cannot know, therefore, that it was of any importance, or that if it had been admitted it could have had any influence upon the verdict."

Now, there is nothing on the face of this exception by which we can see what the evidence was, whether it was material or whether the defendant sustained harm by it, for if he sustained none, then, although the witness examined

was incompetent, it could have made no difference to him in the final result. It is true that the record states that the evidence was "in *behalf* of the prosecution," but we do not see that that informs us of anything. This exception must then be overruled for the reason stated.

The fifth exception is in regard to the testimony of one Wm. Duehay, who was called for the prosecution, and testified as to certain threats which were made by the defendant Queenan against the deceased the summer before the murder. The objection to the admission of this testimony was that the threat was made too long anterior to the deed. But we think otherwise. Threats are evidence in a case of this kind, and there is no particular limit to time, and we think that the summer before the murder was not too remote in point of time.

The next exception is as to the testimony of one Benjamin Johnson. This witness testified that he had been in company with these parties on the night of the murder, and had seen them attack and knock down the defendant. The United States, then, in confirmation of Johnson's testimony, offered the evidence of one Washington Braxton, who had heard Johnson relate the same story on the Saturday morning after the murder; but at that stage of the trial the court excluded the testimony. The defense then called the prisoners themselves, and as the bill of exceptions sets out, "each of the defendants was examined on his own behalf, and swore that neither he nor his co-defendants were with Johnson on the evening or night of the homicide, and did not, nor did either of them, have anything to do with the homicide, and contradicted all Johnson's evidence in respect to their connection therewith."

After the defendants had testified as above, the United States renewed the offer, which had been rejected, to prove by Braxton that on the Saturday morning after the murder Johnson had told him (the defendants not being present) the same story that he had told in court. This evidence the judge trying the case now held admissible, to which the defendants excepted, upon the ground that Johnson's state-

ment, not under oath, could not be better than that given under oath.

We think that the evidence was competent. There has been much conflict of decision in regard to this question. Evidence in corroboration of the statement of witnesses under certain circumstances has always been received, and under certain other circumstances it has always been rejected, so that the question in each case is, whether the circumstances are such as to allow the corroboration.

The Maryland authority upon the subject is to be found in *Cook vs. Curtis*, 6 Harris and Johnson, 93, where the Court of Appeals, by Buchanan, J., said: "We can perceive no good reason why the evidence offered and rejected should not have been received in corroboration of what was sworn to in the deposition of Doctor Kingsmore, a sufficient foundation for that corroborating testimony being laid by the plaintiff, in offering evidence that Kingsmore was not present at the birth of any of Mrs. Cook's children, which was substantially to impeach his credibility. And where the credibility of a witness is attacked by the opposite party, his prior declaration may be given in evidence to show his consistency."

That decision was subsequently affirmed in the case of the *Washington Fire Insurance Co. vs. Davison et al.*, 30 Md., 91, where it was held, in the language of the syllabus, "that if a witness swears he was present on a certain occasion when a certain act was done and a particular remark was made, and the opposite party proves that he was not present, such proof goes to impeach the credibility of the witness, and his testimony may be corroborated by proof of prior declarations in regard to the alleged act and remark."

In the Supreme Court of the United States, in the case of *Ellicott vs. Pearl*, 10 Peters, 439, Mr. Justice Story, in speaking upon the subject, lays down the general rule that such evidence is not admissible; but, after giving the reason of the court for rejecting the corroborating evidence in that case, and laying down the general rule as to such testimony, he says: "We say in general, because there are exceptions, but they are of a peculiar nature not applicable to the cir-

cumstances of the present case ; as where the testimony is assailed as a fabrication of a recent date, or a complaint recently made ; for there, in order to repel such imputation, proof of the antecedent declarations of the party may be admitted." The opinion of Judge Story seems to fully sustain the Maryland authorities, which, as far as the facts relate to the question raised here, are very strongly in point.

We, therefore, see no error in submitting this evidence in corroboration of Johnson's story.

The same principle applies to the seventh exception, which refers to the testimony given by the witness Croggon, who testified in corroboration of Johnson's statement that he had been told the same story by Johnson on the Sunday following the murder.

And so, too, the same ruling must apply to the eighth exception, where, in corroboration of the testimony of a man named Brown, produced by the prosecution, and who testified that he had met the defendants, and the witness Benjamin Johnson, in the immediate vicinity of the scene of the murder of the deceased, Hirth, on P street, immediately before the time of its commission, and that he, said Brown, was then in company with a man named Richard T. Craig ; and the defendants, upon cross-examination of said witness, asked him whether he had not been confined in the penitentiary, to which he answered, no ; and whether he had not been drummed out of camp, with his head shaved, for selling whiskey to soldiers, and admitted that he had been so treated unjustly ; and also whether he had not been a common informer in liquor cases, and admitted that he had testified for the District in such cases ; and whether he had not been paid for testifying in this case, to which he answered, no ; and whether he had not attempted to bribe the above-mentioned Richard T. Craig to testify before the grand jury that he, Craig, had been in company with the witness Brown on the night of the murder, and had seen the defendants and the witness Benjamin Johnson in the vicinity of the scene of the murder and immediately before the time of its commission ; and whether he had not learned from the news-

papers all the matters which he had testified to here about the defendants being in the vicinity of the homicide at the time it was committed; whereupon the United States, in rebuttal, and in corroboration of the said evidence of the said Brown, offered to prove by one James C. Little that the witness Brown had, on Thursday morning, the day after the murder, made to him, not in the presence of the defendants, or either of them, substantially the same statement concerning the same matter; to which said offer the defendants objected, and which said objection the court overruled, and permitted the said testimony of the said witness Little to be given to the jury; to which ruling of the court the defendants excepted," &c.

The ninth exception relates to the testimony of the defendant Edward Queenan, and is as follows: "Be it remembered that," &c., "Edward Queenan, one of the said defendants, having testified on his own behalf, on cross-examination was asked by the attorney for the prosecution this question:

"Are you the same Edward Queenan who was arrested with one William Broadus and William Simms, in 1875, on a charge of stealing a coat, overcoat, and umbrella, and turned State's evidence, and appeared as a witness in that case?" To which question the defendants objected, and which objection the court overruled, and the said Queenan was required to answer thereto, and answered that he was.

And the United States thereupon offered the record of the said conviction of Broadus, and read the same to the jury; to which ruling of the court the defendants excepted, &c. We do not see that any harm was done the defendants by this question, or its answer, and, therefore, overrule the exception.

The tenth exception relates to the admission as a witness of one Waterman P. Bagley. It appears that in the list of witnesses which was served upon the defendants two entire days before the trial, this witness was described as Wm. P. Bagley. Now, "Wm." is usually supposed to be an abbreviation for "William." But the witness, on being

sworn, testified that his name was not William P. Bagley, but Waterman P. Bagley. If the notice had been simply W. P. Bagley, there would have been no objection to the absolute identity of the party. This was a very close technical objection. But as we have nothing in the record to show what his testimony was, or even its purport, we are not called upon to consider whether to reverse upon it or not.

The eleventh exception is as follows: "Be it remembered, that," &c., "one Richard T. Brown, having been called as a witness and sworn on behalf of the prosecution, testified that, on Wednesday, January 7, 1880, at night, and about eight or a quarter to eight o'clock, he saw the defendants in this cause and one Benjamin Johnson near the corner of Seventeenth and P streets, and on the north side of P street, and that the defendant Neverson spoke to him, and that he, the said witness, then passed on, and that a man by the name of Craig was with him at the time; and having been shown one Richard Craig, said that that was the man. The defendants asked on cross-examination of the said witness Brown the following questions:

"Did you not, in the restaurant, on the corner of Ninth and Boundary streets, or that immediate neighborhood, on the 29th of January, 1880, tell Richard T. Craig he could have fifty dollars by testifying he was with you when you met the men on Seventeenth street?"

"Did you not, then and there, say to Craig that you would give him fifty dollars, or he could have fifty dollars, if he would go before the grand jury and testify that he and you met Bedford, Queenan, Pinn and Johnson on Seventeenth street between N and O streets, and that you walked up Seventeenth to P street?"

"Did you not, at the same time and place, ask Craig to state that while the men talked with you, that he, Craig, stepped ten or fifteen feet away?"

"Did you not, at the same time and place, ask Craig to go over with you to Fourteenth street and get a portion of the money—two dollars?"

"Which said questions the witness answered in the negative.

"Whereupon the defendants in defense offered to show by one Richard T. Craig, whom Brown had identified as the man who had been with him on the night of the murder, that the said Brown had made the said statements to and the said requests of the said Craig at the time and place in the said questions mentioned, which offer the court refused and which testimony was rejected; to which ruling of the court the defendants excepted," &c.

These questions were entirely collateral to the issue, and it is plain that the defendants were concluded by the answer they received.

The twelfth exception is as follows: "Be it remembered that," &c., "the prosecution, to maintain the issue on its part joined, offered the evidence of Charles Saffell, as to the manner of the defendant Joseph Neverson at the drug store, in the presence of the body of the deceased, Hirth, on the night of the murder; whereupon the defendants offered by one William T. Criswell to show what the defendant Neverson said at that time and place, while he was standing by the body of Hirth, which offer was by the court refused; to which refusal the defendants then and there excepted," &c.

Now, a witness had been called upon by the prosecution to prove what Neverson *did* whilst standing by the body of the deceased on the night of the murder. The defense did not cross-examine that witness at all but let him go. He had not been asked by the prosecution what Neverson *said*, but even without that, I am inclined to think that he might have been cross-examined in regard to it. But no cross-examination was attempted, and afterwards an independent witness was called by the defense, not to contradict the witness who had been called on the part of the prosecution, not to explain away the conduct of Neverson, but to prove another and different fact.

Now, it is a general rule that the declarations of the party accused of the crime are not evidence for him. *State vs. Hildred*, 9th Iredell, 440.

Sometimes words are so mixed up in deeds that they become part of the *res gestæ*. But it seems to us that that was not the case here. The ruling we think was right. But there is another objection to this exception, the same objection that has proved fatal to others already passed upon.

Let it be known that the point of the exceptions is this:

“Whereupon the defendants offered by one William T. Criswell to show what the defendant Neversen said at that time and place while he was standing by the body of Hirth, which offer was by the court refused.”

As is shown by the decision in the Supreme Court already quoted, it was the duty of the defendants to have told the court what they proposed to prove by this witness.

And here it may be a suitable place to observe the difference between incompetent testimony that has been received, and an offer of evidence which has been refused.

If incompetent testimony has been received it is clear, under the decisions, that it must be set out in the bill of exceptions so that the court may see what it is; whether any harm has come to the defendant. Where evidence is offered but not received, there it is necessary that the party who offers it should apprise the court of what he hopes to prove so that the court may have something to act upon, and the record must show it. In one case the court acts upon evidence received, and in the other case it acts upon the offer of evidence. In this case, no evidence was received, and according to the decision of the Supreme Court it is necessary that the defendant should state, in his bill of exception, what it was he proposed to prove.

We have now reached the thirteenth exception. A witness by the name of Sarah Turner, having been called by the defense for the purpose of proving an alibi for the defendant Queenan, testified in the course of her examination, “that on the evening of the murder, and about six o’clock, the defendant Queenan called at Mrs. Ridenour’s, her service place, and that she saw him there; and having been cross-examined by the prosecution, and having left the stand, was recalled by the prosecution, and asked the following question,

against the objection of the defendants: ' Did you not, on Friday, at Mrs. Ridenour's house, say to officer Acton that Queenan did not call for you at your place of service, and did not come there, and that you first saw him at your sister's ? '

" To which question the witness answered, ' no ; ' but that she did say that she saw him at her sister's ; whereupon the Government offered to prove by one Joseph Acton that he had had an interview with one Sarah Turner at Mrs. Ridenour's, on Friday, January 16th, and that she told him that she did not know Queenan, and that he did not come to her service place on the night of the murder, and that the first she saw of him that night was at the house of her sister ; to which offer the defendants objected ; which objection was overruled by the court ; to which ruling of the court the defendants excepted," &c.

It is claimed by the defense that the answer of the witness to this question was conclusive upon the prosecution, it being a question asked in cross-examination upon a motion collateral to the issue ; we do not think so, the alibi which the defendant Queenan had set up was a material matter of the case or fact upon which the trial turned and Sarah Turner's testimony was important testimony relating to that question. The government had an undoubted right to contradict her statements in regard thereto. So that we see no error, therefore, in this ruling.

The fourteenth exception contains the prayers for instructions which were submitted by counsel for the defense and the charge of the court to the jury. The court refused to grant any of these prayers except one upon the question of credibility, but grouped the points in the case in a general charge to the jury covering the whole ground, and in this charge we see no error.

There are some other exceptions taken by counsel for the defendant Pinn relating to the selection of the jury. Certain questions were put to persons who had been summoned to attend as jurymen going to the matter of their competency. But after the inquiry into competency had been

made and the judge had ruled that they were competent, they were peremptorily challenged by the defense so that they did not sit on the jury and the defendants were not prejudiced even if the ruling of the court were wrong, unless in consequence of the ruling they were compelled to exhaust their peremptory challenges upon incompetent jurors. But it does not appear from the record that the peremptory challenges for the defendants were exhausted and we are not to presume anything against the fairness of the trial below or to decide upon the ruling of the court unless it appears upon the record that if wrong the party taking the exception was prejudiced by it.

Judgment affirmed.

Mr. Justice MAC ARTHUR, while concurring in the judgment, said:

There is just one point in the decision of my brother Wylie upon which I desire that I should not be concluded, and while concurring in all else that has been decided, I think, in justice to myself, I ought to indulge in a single expression, and that is as to the construction of the statute requiring service of the list of the jurors and of the witnesses two full days before the trial.

We all agree that this must be done, for the purpose of authorizing the examination of any witness produced for the purpose of sustaining the indictment. We are not to presume, however, that Congress in passing this act intended by it to deprive the prosecution of material testimony. The act was passed in view of a well-established practice, both in civil and criminal cases, that newly-discovered testimony was always the foundation for relief. And even these defendants are entitled to a motion for a new trial upon this very ground, if they had the materials upon which to base it. The reason that the prosecution would not, without a verdict, be entitled to the same remedy, is simply because the government has no motion for a new trial at all.

Now, the practice pursued in one of the cases cited, in New Hampshire, recognized this practice in a criminal case

under a statute. It was the practice pursued upon the trial of this case in the court below ; and I apprehend that the Government, after using the utmost diligence and exercising the utmost good faith, may not be able to name all the witnesses previous to the commencement of the trial. And in some cases, perhaps, it would be impossible that the Government should be able to know all the facts that might be proved by a subsequent development of testimony.

Suppose, for instance, that a defendant on trial, upon a charge of homicide, should make a declaration or a confession, after the trial commenced, of his guilt. Is it possible, under such circumstances, the Government would be debarred, under the statute, from producing before the close of the trial, testimony of that description ?

Now, I apprehend that this statute was not intended to abrogate this practice. It does not in terms abrogate it, and I think that, without any express provision of that description, the practice must be considered still in vogue in the trial of indictments as well as in the trial of civil suits.

The main objection that has been taken to this mode of proceeding is, that it might work a surprise upon the defendant, but the statute has guarded him from such surprise by providing that there should be a list of witnesses before the trial commences. But this is a matter which is confided to the entire discretion of the court before whom the indictment is on trial, and the court will see that no injustice is done to the defendant, other than that which would result from the statement of the truth of the facts and circumstances of the case.

If, therefore, a court is of opinion that the defendant is taken by surprise, it will give him such opportunities as it has at its entire command to supply him with the means of curing this surprise, by delaying the trial and giving him process and such time as may be necessary. And if the court see absolutely that a defendant would come to an injury, to an injustice, which he ought not to be subjected to, the court should reject the newly-discovered testimony entirely. But I think it is giving too broad a construction

to this statute to say that the Government shall, under no possible state of circumstances, be entitled to produce any testimony other than that which could be established by the witness who had been previously named. I am, therefore, of the opinion that the ruling of the learned justice who tried this case upon this application was correct, and especially so when there was no affidavit of surprise, no pretense of surprise, and no complaint that any injustice resulted from the testimony.

[NOTE.—The Chief-Justice, though constituting one of the three judges who sat at the hearing in General Term, was unable to be present at the delivery of the opinion. Mr. Justice Wylie, however, said, in concluding, that they were authorized by the Chief-Justice to say for him that he dissented from the conclusion of the court.]

LEMONT

vs.

WASHINGTON & GEORGETOWN RAILROAD COMPANY.

AT LAW. No. 17,857.

{ Decided April 11, 1881.

{ The CHIEF JUSTICE and Justices MAC ARTHUR and JAMES sitting.

1. If the conduct of a passenger upon a street car is such that his expulsion appears to the conductor to be a just and proper expedient for the purpose of preventing a violation of decency and good order, the conductor will be justified in expelling him, the company being responsible for an abuse of this discretion or of any oppression in its exercise, and it will be error if the court so instruct the jury as to take away from them the consideration of the question whether the conduct of the passenger furnished a reasonable and probable cause for apprehending a breach of good order.
2. A sick passenger on a street car must conform to the reasonable regulations of the car company, he has no prerogative to misbehave and to subject the other passengers to annoyance by his offensive conduct, and it will be no protection against his expulsion from the car, that his misconduct is not wilful or voluntary. The absence of an evil intention is a good defence to an indictment, but it cannot exonerate a person who is honestly supposed to be drunk and who repeatedly disobeys the request of the conductor to behave himself.
3. The rule to be applied to steam cars in regard to accommodations to sick or decrepit persons is not a proper rule to be applied to horse railways. What might be permitted on the former, where the journeys are long and continuous, could not be practiced on the latter without great inconvenience to the company and the passengers. If the passenger is known by the conductor to be sick (and good faith requires that he be informed by the passenger of that fact in order that proper and reasonable allowance may be made for what may seem unusual or obnoxious in his conduct) and he is shown good treatment, the company will not be required to provide, without a special contract, any extra means for his accommodation.
4. An instruction which implies that vomiting in a street car from intoxication is the only form of that evil which will authorize the conductor to expel the offending passenger, is erroneous, as it takes from the minds of the jury, all other forms of the evil, which, in the proper management of the car might justify the conductor in ejecting the passenger.

STATEMENT OF THE CASE.

MOTION for a new trial on exceptions.

This was an action to recover damages for injuries alleged to have resulted from the misbehavior of the defendant's servants in ejecting the plaintiff from a street car. The plaintiff's case, as developed by his testimony, was substantially as follows: That on the 12th of May, 1877, at or about seven o'clock in the afternoon, he en-

tered one of the cars of defendant, being assisted thereon by one Simpson, a friend of his ; that he was at that time a sufferer from an attack of paralysis from which he had not entirely recovered ; his affliction had also deprived him of his voice, so that he was compelled to resort to signs and the use of a slate for purposes of communication ; that at the time he was put upon the car by Simpson, the latter told the conductor to put plaintiff off at the corner of Tenth street and Pennsylvania avenue. A few minutes after the car started, and plaintiff being in a very fatigued and feeble condition, fell asleep. The conductor neglected to wake him up, and carried him to the end of the line. Plaintiff was then told that he must take another car and go back. Upon entering the car pointed out he sat down, and almost immediately fell asleep. Soon after, the conductor came in, shook him, and told him if he did not sit up he would be obliged to put him off the car ; plaintiff sat up, but in a short time fell asleep again, was again admonished by the conductor, and again fell asleep ; whereupon the conductor in a rude and rough manner seized hold of him and carried him to the rear platform, plaintiff resisting as far as his strength would permit, but the conductor being a strong man pushed him off into the street, injuring him so seriously that he was confined to his bed for several days, and afterwards suffered another attack of paralysis, in consequence of which he had ever since been unable to walk, and had to be carried about in an invalid's chair. The functions of his bladder also failed to perform their office. Plaintiff at time of trial was still in this afflicted condition, except as to the loss of his voice. This he had recovered three or four days after he had been put off the car, and had been able to talk ever since. Plaintiff also testified that he had expended large sums of money for medical treatment.

On the other hand, the evidence in behalf of the defendant, which was given by ten or eleven witnesses, was that the plaintiff was drunk, and had vomited in the car ; that in consequence of his drunken condition, he would repeatedly lie down upon the seat after being straightened up by the conductor ; that

the third time he lay down upon the seat his head struck the lap or the body of a lady passenger, and so much alarmed her that she made a movement to leave the car, whereupon the conductor took hold of the plaintiff and ejected him from the car, using no more force than was necessary for that purpose ; that the time plaintiff was spoken to about lying down on the seat he was abusive and profane to the conductor ; and when he was put off the car, the conductor held him off the platform with one hand while with the other he pulled the bell rope to start the car ; that when the car started he let go plaintiff, who thereupon seized the iron handle of the dashboard of the car and attempted to get on again ; that the car being then in motion he was thrown down and was dragged for five or six feet along the street ; that the conductor stopped the car and loosed the hold of the plaintiff. Some person in the crowd that had been attracted by the disturbance, then held the plaintiff while the conductor re-started the car and went on his journey ; that at the time of the occurrence there were four passengers in the car, three ladies and one gentleman.

The plaintiff, being recalled as a witness in rebuttal, denied that he was drunk, or that he had misbehaved himself.

Several other witnesses also testified in rebuttal that when plaintiff arrived at his boarding house at about nine o'clock that evening, he was entirely speechless, and was not intoxicated.

The evidence being closed, among the instructions granted at the request of counsel for plaintiff, were the following:

“If the jury find from the evidence that Lemont was drunk, that fact would not justify the conductor in expelling him from the car, unless they also find that he was disorderly and refused to be controlled by the conductor ; or was disgusting and offensive to the other passengers.”

“If the jury find from the evidence that Lemont was not drunk, but that from drowsiness consequent upon his fatigue and infirm condition he fell over on the seat of the car so as to lay his head and body thereon, while his feet were on the

floor, this would not justify the conductor in expelling him from the car, although he had several times repeated it, and the conductor had cautioned him to sit up straight or he would put him off the car, unless they find that he wilfully or voluntarily disobeyed the conductor's request, although the conductor may have supposed him to be drunk; and if under these circumstances the conductor attempted to put him off, he had a right to resist by force, and the defendant is liable for all the injury he sustained in being thus put off the car, or in his effort to resist the conductor in putting him off."

Prayers Nos. 5, 6 and 7 of the defendant were as follows:

No. 5. "If the jury find from the evidence that the plaintiff got upon the car of the defendant on the evening of the alleged injury, and he persistently and repeatedly lay down upon the seat of the car, notwithstanding that he had been repeatedly forbidden so to do by the defendant's conductor, and contrary to the rules of the defendant, the said conductor was justified in ejecting the plaintiff from the car, and the verdict must be for the defendant, provided, the conductor used no more force in ejecting him than was reasonably necessary for the purpose."

But the court refused to so instruct the jury, except with the following modification:

"And unless the jury find that the acts of the plaintiff were the consequence of debility resulting from bodily infirmity or sickness, not resulting from intoxication."

No. 6. "If the jury shall find from the evidence that the plaintiff, being on the defendant's passenger car which was proceeding along its line towards Georgetown, vomited in and upon such car in consequence of sickness produced by the use of intoxicating liquors, [or otherwise] it was the duty of the defendant's conductor to eject him from such car, and for that purpose the conductor had a right to use as much force as was reasonably necessary."

Which instruction was granted except as to the words "or otherwise," which were struck out by the court.

No. 7. "If the jury shall find from the evidence that the

defendant's conductor ejected the plaintiff from the car and then set the car in motion, and that the plaintiff endeavored to get upon the car again whilst the car was in motion in defiance of the conductor's wishes and efforts to keep him off, and that in such effort to get upon the car again, he was injured—he cannot recover for injuries received in making such an attempt. He had no right to attempt to get upon the car after having been ejected and whilst the car was in motion.”

But the court gave the instruction by inserting after the word “car” where it first occurs, the following words: “So that he was entirely separated from it,” and by inserting after the word “plaintiff” where it occurs secondly in the prayer, the words “ran after and.”

Defendant excepted to the granting of plaintiff's prayers, and also to the modification of his own.

The jury returned a verdict for the plaintiff for \$15,000.

McPHERSON, HINE and HENKLE for plaintiff.

DAVIDGE and TOTTEEN for defendant.

Mr. Justice MAC ARTHUR, after briefly stating the case, delivered the opinion of the court:

At the close of the testimony the learned justice presiding at the trial, instructed the jury, at the request of counsel for the plaintiff, that “if the jury find from the evidence that Lemont was drunk, that fact would not justify the conductor in expelling him from the car, unless they also find that he was disorderly and refused to be controlled by the conductor, or was disgusting and offensive to the other passengers.”

An exception is taken to this instruction; and it is contended that the right to expel the plaintiff from the car, does not depend altogether upon his actual misconduct, but that he may also be expelled if his condition and conduct were such as to afford the conductor a reasonable ground for believing that if he were permitted to remain in the car he would be guilty of some misconduct or indecency.

In support of the instructions we are referred to the case of *Pearson vs. Duane*, 4 Wall., 605, where the Supreme Court

say, that although a railroad or steamboat company can properly refuse to transport a drunken or insane man, or one whose character is bad, they cannot expel him after having admitted him as a passenger and received his fare, unless he misbehaves during the journey. This is undoubtedly intended as a statement of a general rule, and was quite appropriate to the facts in that case, as there was no question at all about the conduct of the passenger being entirely unobjectionable, and that it afforded no reasonable ground to believe that he would misbehave in any respect. There are, however, adjudicated cases in which this distinction has been expressly considered and enforced; and they decide that where the circumstances are of such a striking character as to give rise to a reasonable and honest apprehension of disorder and annoyances from the conduct and condition of a passenger, the conductor may exercise his authority and exclude the offender in order to maintain the peace and safety of the vehicles intact. It is evident that the police of horse railway cars, in order to be efficient, must be preventive as well as retroactive, and this can only be done by allowing the conductor to exercise a reasonable discretion in order to prevent acts of impropriety and violence, when they are likely to occur. A homicidal lunatic, or a notorious thief, may be ejected, although they have neither slain or robbed a passenger, if there is reasonable fear of danger. Each case must, of course, depend upon its own circumstances; as was said in *Vinton vs. Middlesex R. R.*, 11 Allen, 304, it is obvious that any such restriction on the operation of that rule of law would greatly diminish its practical value.

The safeguard against an unjust or unauthorized use of the power is to be found in the consideration that it can never be properly exercised, except in cases where it can be satisfactorily proved that the condition or conduct of a person was such as to render it reasonably certain that he would occasion discomfort or annoyance to other passengers if admitted into a public vehicle or allowed to remain. This case is referred to more recently by the same court with approbation in *Murphy vs. U. P. R. R. Co.*, 118 Mass., 228.

In the case of *Thurston vs. Pacific R. Co.*, 4 Dill., 321, the question was, whether the company had the right to exclude gamblers from its trains, and the court observed, "whether the plaintiff was going upon the train for gambling purposes or whether from his previous course, the defendant might reasonably infer that such was his purpose, is a question of fact for the jury." *Jencks vs. Coleman*, 2 Sumner, 221, was an action against a steamboat company for excluding a person who came on board the defendants' steamer for the purpose of soliciting passengers for a rival line. After stating the case and explaining the general obligations of carrier and passenger, Mr. Justice Story, who presided at the trial, charged the jury that "the only question in the present case is, whether the conduct of the proprietors (defendants) of the steamboat has been reasonable and *bona fide*." Thus we see that reasonable and probable cause will authorize the carrier or his agents in the business to exercise the right of exclusion in a proper case where a breach of good order might reasonably be apprehended. We think, therefore, the defendant was entitled to have all the circumstances of the case considered by the jury, and if his conduct appeared reasonable and his expulsion of the plaintiff a just and proper expedient for the purpose of preventing a violation of decency and good order, the verdict ought to have been for the defendant. Of course, as already remarked, for an abuse of this discretion or for any oppression in its exercise the company would be responsible. The doctrine, being thus guarded, seems to rest on principle as well as authority. The instruction under discussion deprived the defendant of the consideration whether there was reasonable cause for the conductor, and hence was erroneous and the exception well taken.

The jury were told, at the request of the plaintiff's counsel, that the conductor had no legal right to expel the plaintiff unless they find that he wilfully or voluntarily disobeyed the conductor's request to leave the car, even though the conductor may have supposed him to be drunk. Here the broad doctrine is laid down that

offensive conduct on the part of a passenger is not a proper cause of expulsion unless such conduct is wilful or voluntary, and that the other passengers may be subjected to any degree of annoyance so long as the offender is not wilful in his misconduct. We are not aware of any principle by which this proposition can be maintained. The absence of an evil intention is a good defense to an indictment, but surely that principle cannot be alleged to exonerate a person honestly supposed to be drunk, and who repeatedly disobeys the request of the conductor to behave himself. If it be said that the plaintiff was sick, good faith at least required that he should inform the conductor of the fact. It is not only reasonable but necessary that sick and decrepit people should be transported on street railways, as they are on steam railways, but their right in this respect is not unlimited. The rule to be adopted on steam trains where the journeys are long and continuous, would not be the proper rule to adopt when the same is to be applied to horse railways. *Murphy vs. U. P. R. R.*, 118 Mass., 228. Sleeping accommodations and other modes of rest are expected and necessarily allowed in the former, and the passengers frequently occupy more than their own seat to relieve the unrelaxed muscles on a long ride. But a similar act could not be practiced on a street car without very great inconvenience to the company and the other passengers. A sick person has no prerogative to misbehave and must conform to the reasonable regulations of the company, and while showing him good treatment they are not required to provide, without a special contract, any extra means for his accommodation. It is at least reasonable that the conductor should know the facts which render his condition peculiar in order to extend unusual indulgence, and also that he may make proper and reasonable allowance for what may seem unusual or obnoxious in the conduct of the passenger. These considerations show how much the jury were misled from the true question for their determination. We think this exception is also well taken.

We are further of opinion that the court erred in

regard to the fifth and sixth instructions for the defendant. The court was requested to charge that if the plaintiff persistently and repeatedly lay down upon the seat of the car notwithstanding that he had been repeatedly forbidden so to do by the defendant's conductor and contrary to the rules of the defendant, the conductor was justified in ejecting plaintiff from the car. But the court refused so to instruct the jury except with the modification following: "Unless the jury find that the acts of the plaintiff were the consequence of debility resulting from bodily infirmity or sickness not resulting from intoxication." Thus the jury were told that if the acts of the plaintiff were caused by infirmity or sickness they constituted no justification for expelling him from the car. Now, there is no pretence in the bill of exceptions that the defendant's conductor on the car from which the plaintiff was expelled, had any knowledge that the plaintiff had any disability, bodily infirmity or sickness not resulting from intoxication. It was proved that the plaintiff slept in the car and could not or would not keep awake, and upon being roused up by the conductor and cautioned, immediately relapsed into sleep, and the conductor supposed him to be drunk. The plaintiff made no explanation and made no complaint of sickness, yet the jury were told that if the acts enumerated in the instruction were caused by sickness they afforded no justification for ejecting him. This is to charge the proprietors of a street railway car with extra care and diligence in case of a sick passenger when the agent of the company had no knowledge that the passenger was sick, and when he supposed him to be only drunk, and attributed his misconduct to that cause alone. The plaintiff's paralysis was accompanied with a loss of speech. He had, however, the sign language so common on street railways, besides his habit of communicating by writing. But he resorted to neither of these means of explaining his conduct. To say that the plaintiff was entitled to indulgence as an invalid which was not extended to other passengers, and that he was not bound to explain his condition when he was repeatedly requested by the conductor not to lay down upon

the seats, is so evidently calculated to mislead the jury, that we cannot but think it produced serious injustice to the case.

The qualification to the sixth instruction implies that a passenger who vomits in a street railway ~~from~~ from intoxication, may be ejected, but not otherwise. This is stating the rule too broadly. Much, of course, must depend upon the cause and also upon the extent and nature of the attack. In the infinite variety of circumstances a general rule for all cases can hardly be laid down with safety, and we must on this account submit the question whether the case was one to justify the removal of a passenger, under proper instructions from the justice presiding at the trial. To charge the jury that vomiting from intoxication was the only form of that evil which would authorize the conductor to expel a passenger, is to withdraw from the minds of the jury all other forms of the evil which might excuse the conduct of the conductor in the proper management of the car. In this view we can neither wholly approve of the instruction nor of its qualification by the court, and submit this expression to relieve the new trial from embarrassment on an important point.

We are of opinion that the qualification of the seventh of defendant's instructions withdrew the question of contributory negligence from the consideration of the jury, and is clearly improper.

We have not found it necessary to examine the case made or to pass upon the motion based upon that record. For the reasons already mentioned a new trial upon the exceptions must be allowed.

GEORGE A. MORRISON ET AL. vs. HENRY C. SHUSTER ET AL.

IN EQUITY. No. 6962.

AND

WILLIAM P. WERNWAG ET AL. vs. HENRY C. SHUSTER ET AL.

IN EQUITY. No. 7093.

{ Decided April 11, 1881.

{ The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

1. A bill which prays the appointment of a receiver on the ground that the defendant had so mixed complainants' goods with his own, that it would be extremely difficult to separate them, should charge that the alleged confusion was fraudulent or wrongful in order to justify the interposition of the court.
2. The bill did not call explicitly for answers upon oath, it prayed that the defendants might answer, etc. *Held*, not equivalent to an agreement to dispense with answers under oath.
3. Where an answer is responsive to the charges of the bill and swears away its equity, the denials of the answer must prevail, and the bill will be dismissed, unless the defendants' statements are contradicted by the testimony of two witnesses, or of one witness with pregnant corroborating circumstances.
4. Under a prayer for general relief the complainant can only claim relief of the same general nature as that prayed in the bill. So, too, the claims under the general relief clause must be consistent with the particular relief claimed, nor can different parts of the bill claim relief upon principles diametrically opposite. Therefore where the complainant claims upon the distinct ground that he is not a creditor of the defendant and is denied relief, he cannot, under the prayer for general relief, claim upon the hypothesis that he is a creditor.
5. If the court has no jurisdiction when the bill is filed (by reason of the complainants not being judgment creditors) the recovery of a judgment afterwards cannot be set up by a supplemental bill so as to confer the jurisdiction; the supplemental bill falls with the original.
6. A deed of assignment, after making preference of two creditors and providing for the expenses of the assignment, directed that out of the residue of the proceeds, the assignees should pay *pro rata* the claims of such of his other creditors as should agree to execute full releases to him of their claims, and that the *pro rata* share which would be payable to any creditor who might refuse to execute such release, should be paid over to the grantor. Upon a bill filed against the assignor and assignees, praying, among other things, that the defendants be enjoined from carrying the assignment into effect, the court passed an order as follows: "The assignor is enjoined as prayed in the bill, and the other defendants are enjoined as assignees, as prayed for, *except as hereinafter provided*." The order then proceeded to constitute the assignees named in the deed, receivers of the court, and directed them to take possession of all the effects of the assignor referred to in the assignment, sell them and bring the proceeds into the court, the concluding sentence of the order being, "This order is without prejudice to any of the rights, interests, or equities of the parties or of the said creditors of, in and to the property aforesaid." After the sale of the goods by the receivers and the ratification thereof by the court, S. the assignor, made a second assignment of the same property to the same assignees (now the receivers) substantially the same in terms as

the first, except that it recognized the invalidity of the clause requiring releases and directed the distribution of the property equally among the creditors after the payment of the two preferred debts. *Held*, that the clause requiring releases rendered the first assignment void, and that the second assignment having been made to cure this defect and with no purpose to interfere injuriously with the title of the receivers but rather to ratify and confirm it, so far from being in contempt of the existing injunction, was rather in aid of the order of the court, since the informality of the original assignment might be supposed to affect the title of the assignees and impair the rights of purchasers.

7. The dismissal of a bill filed to set aside an assignment and, after a preliminary injunction obtained, restraining the assignor and assignees from carrying the assignment into effect, will deprive any party of the right to insist that the execution of a second assignment of the same property during the pendency of the suit was in contempt of the injunction.
8. The mere fact of a *lis pendens* does not invalidate an assignment; a debtor pending a suit may assign to trustees all his effects for the benefit of all his creditors and deliver possession and it will be valid.
9. Where an assignment is defective a second assignment may be made to amend its errors, but it is only to be taken as a curative of the defects of the first and not as establishing any additional or further priorities. Hence, provisions increasing the amounts of preferred claims over the sums named in the first deed by increasing the rate of interest cannot be operative against the statement of the same preferred claims in the first deed. In the same manner a particular statement in the second deed as to the percentage to be paid to the assignees for commissions cannot be operative against a general provision on the subject in the first deed, the functions of the second deed being only to render valid and effective the provision of the first.
10. A debtor in insolvent circumstances, by assignment of his estate in trust made in good faith, when no law or lien prohibits, may lawfully prefer one creditor or set of creditors to another.
11. The mere silence of a purchaser as to his financial condition at the time of sales made to him, even if he had then known himself to have been insolvent, is not sufficient to warrant a rescission of the sales for fraud; an honest though abortive purpose to continue business and pay for goods bought, is consistent with the vendee's knowledge of his insolvency, and the purchase is not fraudulent when made with such intent, though founded in delusion and unreasonable expectations; there must have been *an intent not to pay at the time of purchase*.

THE CASE is stated in the opinion.

GARNETT, WORTHINGTON, ELLIOT and CARLISLE for plaintiffs and petitioning creditors.

EDWARDS & BARNARD for defendants.

Mr. Justice HAGNER delivered the opinion of the court.

The first step in these cases was a bill filed by Morrison, Harrimon & Co., against the defendants, on the 16th of September, 1879. It alleged that the complainants were

wholesale dry goods merchants in the city of Philadelphia ; that the defendant Henry C. Shuster was a retail dry goods dealer in Washington city ; that for nearly a year he had been purchasing, from time to time, goods from the complainants ; that on four occasions, named in the bill, the first in May and the last in August, 1879, the complainants had furnished him with large quantities of dry goods, which had been received by him and placed on the shelves in his store ; that about the tenth of September they received a communication from him stating his belief that he would be unable to meet his notes, not yet due, for the goods so furnished. The bill then charged that for the previous six months Henry C. Shuster had been, in fact, insolvent ; that he knew such to be his financial condition, and had obtained the goods from the complainants knowing his inability to pay for them ; that under these circumstances there was no valid contract of sale between the parties, and the complainants were advised that they were entitled to demand the re-delivery of their goods ; that they accordingly made this demand upon Henry C. Shuster, but he refused compliance, and forthwith executed to the defendants, William M. Shuster, jr., and Daniel Larrabee, an assignment in writing of all his property, including the said goods of the complainants, by which the assignees were empowered to make sale of the effects conveyed, and collect all debts due to the assignor, and from the proceeds to pay, in the first instance, to his brother, William M. Shuster, about \$1,700, and to his mother-in-law, Mrs. Emily Fuller, \$600 ; and out of the residue of the proceeds, after defraying the expenses of the trust, to pay *pro rata* the claims of such of his other creditors as should agree to execute full releases to him of their claims ; and that the *pro rata* share which would be payable to any creditor who might refuse to execute such release, should be paid over to the grantor ; that this assignment was void by reason of the requirement therein of releases, and the resignation of part of the proceeds to the grantor ; that the defendant had so mixed the goods thus obtained by him from the complainants with other goods in his store, that it

would be extremely difficult to separate them, and hence they were remediless by action at law to obtain possession of their said property.

The bill prayed that the assignment might be declared void as against the creditors of Henry C. Shuster; that a receiver might be appointed to take charge of the said goods, and hold the credits and other property of Henry C. Shuster; that the defendants might be enjoined from proceeding to carry said assignment into effect, and that the complainants might have such other and further general relief as their case might require.

The bill is not framed as was contended, in conformity with the proceedings in the case of the Idaho, 93 U. S., the circumstances of that case being quite different from those disclosed in the present. But it seems to be justified in its general features by the proceeding in the case of Hyde vs. Ellery, 18 Md., and in the case in 42 Ga., 46, Cohen vs. Myers.

It is worthy of remark, however, that there is no charge in the bill that the alleged confusion of the goods of the complainants with those of the defendant, Henry C. Shuster, was fraudulent or wrongful; and as the Supreme Court, in the case of the Idaho, in announcing the law upon this subject, remarked, that "it is not enough that such confusion should be accidental or even intentional; it must also be wrongful, to justify the interposition of a court upon that ground," the bill might, perhaps, have been demurrable for the want of such an allegation.

A restraining order was passed as prayed. The answers of all the defendants were filed, denying emphatically and in the amplest terms the various supposed equities of the bill. Although the bill did not call explicitly for answers upon oath, it prayed that the defendants might answer, &c., which is certainly not equivalent to an agreement to dispense with answers under oath. Under such circumstances the familiar and well settled principle applies, that where an answer is responsive to the charges of the bill and swears away its equity, the denials of the answer must prevail, and the bill

will be dismissed, unless the defendants' statements are contradicted by the testimony of two witnesses, or of one witness with pregnant corroborating circumstances.

In the case at bar, the complainants have presented no witness at all to overcome the denials of the answers. The only testimony is that produced by the defendants, and the evidence of Henry C. Shuster, taken before the examiner, confirms the denials of his answer in every particular. Under these circumstances there could be no question that the prayer of the bill for the redelivery to the complainants of the goods must be denied. 19 Md., 172, *Blonheim vs. Moore*.

But it is insisted that the court may, under the prayer for general relief, proceed to direct payment to the complainants of the value of their goods out of the proceeds of sale now in court. But it is obvious that the sole theory upon which the complainants' bill was filed was that they were *not creditors* of Henry C. Shuster; that the transactions between the parties with reference to the last four shipments of goods did not constitute a sale in the legal sense of the term, because Henry C. Shuster had no honest purpose at the time he received the goods to pay for them, since he knew he was insolvent, and had no expectation of being able to pay for them; and, in accordance with this theory, by the order of October 7, 1878, appointing the assignees as receivers and authorizing them to sell the property, the receivers, at the request of the complainants, were particularly required to keep separate the proceeds of the property so claimed by the complainants.

It is settled that under a prayer for general relief the complainant can only claim relief of the same general nature as that prayed in the bill, that the claims under the general relief clause must be consistent with the particular relief claimed, and that different parts of the bill cannot claim relief upon principles diametrically opposite. A plaintiff cannot "blow hot and cold" in the same bill in such manner. The court say in *Evans vs. Iglehart*, 6 Gill & Johnson, 171: "Claims must be consistently urged. A party cannot be pursued for the *value* of the property, and then when the

property is found to be more valuable than supposed, be pursued for the property itself." Especially would this principle be observed in chancery courts, where the special prayer for relief is grounded upon allegations of fraud, in fact. 15 Howard, 56, *Eyre vs. Potter*; 7 English Common Law, 260.

But it is urged that the bill is also framed as a creditor's bill, and that under this feature jurisdiction may be maintained notwithstanding the denials of the answer and the absence of proof of the particular charges. The statement in the bill, which it is supposed converts it into a creditor's bill, is in these words: "The complainants sue as well for themselves as for *all other creditors* of Henry C. Shuster *similarly situated*, who may come in and contribute to this suit." But this addition to the original frame of the bill is too inconsistent with its general structure to be considered as a ground of relief. The complainants claim upon the distinct ground that they are not creditors, and upon that hypothesis allege that they are entitled to recover back in kind the goods of which Henry C. Shuster had by fraud possessed himself. Whereas, the phrase referred to says that the bill is filed for the complainants, and for "all other creditors" of Henry C. Shuster "similarly situated."

No person who is a creditor of Henry C. Shuster can be similarly situated with those whose special ground for equitable interference is that they are not creditors at all. A creditor's bill in equity originally was designed to effect a final and complete distribution of the estate of a deceased person; and it is only by analogy that they are tolerated in the cases of living debtors, where the effort is to subject a particular property to the payment of general debts. 2 Harris & Gill, *Strike vs. McDonald*. But the most lenient construction of the rules governing such proceedings would not tolerate a bill like the present, where the effort is to combine claims so entirely inconsistent, as that of complainant insisting that the defendant has dishonestly possessed himself of property belonging to them, a return of which is sought, with the contention by the same complainants, that

they had sold the very goods to the defendant, and are therefore creditors who have a right to subject to their demands the same property as equally belonging to the debtor, with his other assets.

The court below, as we have said, on the 14th of October, passed an order directing the assignees, as receivers, to sell the assigned property and bring the proceeds into court; and by the same order all the creditors of the defendant Henry C. Shuster were granted permission to become parties to the suit. Under this permission Neale & Co. and Phillips Bros. & Co., filed petitions, alleging the recovery of judgments by them against Henry C. Shuster since the filing of the bill, praying that they may might participate in the proceeds, and asking that their judgments might be held to be liens upon the funds returned by the receivers and then in the court. On the 30th of January, 1880, these judgment creditors filed a supplemental bill praying to be made parties complainant, and alleging that since the filing of the original bill, namely, on the 11th of October, 1879, Henry C. Shuster had executed a second assignment to William M. Shuster, jr., and Daniel Larrabee, which recited the execution of the first assignment, and claimed that, notwithstanding the proceedings in the case, he had the right to amend the former assignment in particulars in which it was supposed to be invalid; and he accordingly conveyed to the said assignees all his property of every description, upon trust to sell the same as in the former deed, and, after paying the preferred debts to William M. Shuster and Mrs. Fuller, to distribute the residue *pro rata* among all the creditors of the grantor without any reservation of releases. And the supplemental bill alleged that this second assignment was also void, because at the time it was executed the injunction was in force, which prohibited Henry C. Shuster from executing any such paper, and because the property therein assigned was at the time in the possession of the court; and for the further reason that the assignees under the first deed did not join in the execution of the second, and on these

grounds it was insisted the second deed was an unlawful attempt to modify the first.

It is contended upon the part of the complainants that the proceeding in the case No. 6,962 should be maintained, even if they were originally materially faulty in themselves, because these supplementary proceedings, which it is supposed are correct, were engrafted upon it. But it is quite plain that the evils existing with respect to the original bill filed by Morrison & Co., cannot be cured by anything in the supplemental bill filed by Neale & Co. and Phillips Brothers & Co. These parties, though not judgment creditors at the filing of the original bill, did not pretend that they had not sold their goods to Shuster; they made no claim to recover back their goods in specie, and there was no prayer to set aside the assignments in behalf of creditors generally. The fact that these claimants afterwards obtained judgments would not be effective to confer jurisdiction in the original case, if it did not exist when the bill was filed.

In 31 Miss., 455, *Brown vs. The Bank*, the court announces the well-known principle, that if a court has no jurisdiction when the bill is filed, the recovery of a judgment afterwards cannot be set up by a supplemental bill so as to confer the jurisdiction. The supplemental bill in this case, therefore, falls with the original. We are of opinion that the original bill should be dismissed and the complainants be required to pay all the costs in the case, except such as may have directly grown out of the performance by the receivers of the duty reposed in them by the court's order.

On December 22d, 1879, Wernwag and others, creditors of Henry C. Shuster, filed a second bill against the same defendants, No. 7,098, equity. They alleged the recovery by them of judgments against Henry C. Shuster since the execution of the last deed of assignment, and prayed that both deeds should be set aside, the first as fraudulent, because of the reservation of releases, and the second for the same reasons stated in the supplemental bill of Neale & Co. To this second bill answers were filed by the defendants, and

the testimony taken in the first case is, by agreement, to be considered in the present.

It is plain that the first assignment was fraudulent in law, for the reasons alleged against it; but under the order of the court of the 11th of October, 1879, the persons named as assignees in that deed were constituted receivers of the court, and they reported to the court an offer to sell the entire personal effects in the store to Lansburg & Co., for a designated sum, and the court directed them to make the sale, and to bring the proceeds into court, which they have done.

It was after this sale had been made and ratified, that the second deed was executed, and the questions arising under the second bill are whether the last deed is effective in itself or whether it can have such an amendatory effect upon the first as to cure the informalities of that instrument.

1. It is insisted that the second deed will be held void by the court because it was executed in contempt of the injunction existing at the time. This renders it necessary to inquire as to what was the scope and extent of the injunction. The judge, in his order, decreed that: "Henry C. Shuster is enjoined as prayed in the bill, and that the other defendants are enjoined as assignees, as prayed for, *except as hereinafter provided.*" And the order then proceeds to direct these receivers to take possession of all the personal effects of Henry C. Shuster referred to in the first deed and sell them and bring the proceeds into court; and the concluding sentence of the order is: "This order is without prejudice to any of the rights, interests or equities of the parties or of the said creditors of, in and to the property aforesaid."

It was manifest that, by the terms of this order no injunction was intended to be maintained in force against the receivers, since by its very words they were directed to do that thing which the bill prayed they should be restrained from doing, viz., intermeddling with the goods.

The second deed of assignment had no purpose to interfere injuriously with the title of the receivers. Its only object could be to ratify and confirm their title. The deed was therefore in aid of the object of the order of the 11th

of October, since if the original assignment was informal it might be supposed that that informality would affect the fullness of the title of the assignees, and impair the rights of Lansburg & Co., the purchasers. The purpose of the first bill asking that Henry C. Shuster should be enjoined from intermeddling with the property was to prevent him from interfering with it *to the prejudice* of the complainant, or of persons who were the creditors of Henry C. Shuster. It certainly was not designed to be taken literally so as to subject him to punishment as for breaking an injunction for every possible interference with the goods—if he had moved them in the event of a fire or flood to a place of security; or, if in order to perfect the title of the assignees, he had procured the execution of a second deed by his wife. The second assignment, therefore, so far as being in contempt of the injunction, was a commendable act upon the part of the assignor. But the last clause of the order shows it was passed without prejudice to any of the rights, interests or equities of any of the parties to the property. And this clause was referred to by Henry C. Shuster, in his answer, as a justification of this attempt to perfect the previous deed. It was in fact but a more formal reiteration of his purpose as disclosed in his answer to the original bill, where he stated that the clause requiring releases, in the first deed was placed there inadvertently and in ignorance of its illegality, and that he expressly disclaimed any benefit or advantage under it, and consented that all his property should be divided equally among his creditors after the payment of the two preferred debts.

But apart from this, the dismissal of the first bill deprives any parties of the right to insist that the execution of the second deed was in contempt of the injunction. Even if it could have been so considered, if that bill had been sustained, it cannot be viewed in that light, since its dismissal. If the complainant himself had dismissed it, no one could be heard now asserting that the second deed was in contempt of an injunction which had become inoperative by the complainant's own act; and we hold the same result follows from its

dismissal by the court. The mere fact of the *lis pendens* apart from the injunction could not invalidate such a conveyance. Says Chancellor Kent. 2 Com , (632), "a debtor, pending a suit, may assign to trustees all his effects for the benefit of all his creditors and deliver possession, and it will be valid."

2. It is said that the second assignment is invalid, because it is not signed by the assignees. We do not understand that this formality is essential; and the authorities in section 267 of Burrill on Assignments establish this position. It is quite enough, as is stated in Perry on Trusts, section 260, if the assignees accept the second deed. And it is admitted by a petition of Morrison & Co., in the first case, filed in January, 1880, praying process of contempt against Henry C. Shuster for executing this second deed, that "the trustees have undertaken to accept its provisions," and the same allegation is made in the supplemental bill filed by Neale & Co. We can see nothing of force in these objections to the second deed.

3. Does the second deed amend the errors of the first? A careful examination of the authorities satisfies us that such is its effect. In 17 Wis., 187, the court, speaking of a case like the present, say: "It being entirely competent for the assignees to reconvey to the grantor, and then take a reconveyance, notwithstanding the validity of the first assignment, there does not seem to be anything so essential in the mere formal process of a double reconveyance, which would only get the title back where it started from, that the lack of this proceeding should compel a court of equity to defeat the trust." So in 28 Ver., 155, the court state that an amendment of a second deed under such circumstances is not only allowed, but commendable, and that it might be made by a mere declaration of trust without a formal deed. That case was almost identical, in many of its features, with the one at bar. To the same effect are the cases in 15 Johnson's Reports, 583, Murray vs. Riggs; Ingraham vs. Wheeler, 6 Conn., 277; Burrill on Assignments, section 350.

In 2 Black., 534, the isolated sentence relied upon by com-

plainant's counsel, does not properly admit of the signification endeavored to be given to it; and in the case in *Porter vs. Williams*, 9 N. Y., 148, where a second assignment was held ineffective, it appears from the report that the court based its opinion upon the distinct fact that between the date of the two assignments judgments had been recovered by creditors, and they refused to allow the second assignment validity against these intervening rights by judgment. But in the case at bar no creditors had obtained any liens between the two assignments, and there is no pretence that the commendable attempt of Henry C. Shuster to better the title he had already given to the assignees, for the benefit of his creditors, has worked any harm to any creditor.

In our opinion the second assignment should be taken as a curative of the defects of the first, and not as establishing any additional or further priorities beyond those specified in the first deed. Hence the provisions in the second deed increasing the amounts of the preferred claims of Mrs. Fuller and William M. Shuster over the sums named in the first deed, by the addition of the interest, at an increased rate, cannot be operative against the statements of the same preferred claims in the first deed. In the same manner the statement in the second as to the particular percentage to be paid to the assignees for commissions cannot be operative against the general provision on the subject in the first deed.

The function of the second deed, then, is simply to render valid and effective the provisions of the first assignment.

4. It is insisted, however, that the first deed, as thus aided by the second, should be held void, because of the preferences it gives to the brother and mother-in-law of the defendant, Henry C. Shuster. It is perfectly well settled that a debtor, in insolvent circumstances, by assignment of his estate in trust made in good faith, when no law or lien prohibits it, may lawfully prefer one creditor or set of creditors to another. 2 Kent, 582; *Murray vs. Riggs*, 15 Johnson, 571.

Upon plain principle of common sense there would seem to be no reason why this should not be. A debtor in failing circumstances may take money from his drawer and pay in

full any creditor who in his opinion has an especial claim upon him. He may equally pay him by handing over to him some article of property, as a horse and wagon, or he may verbally authorize the creditor to sell it and pay himself from the proceeds. And this he may equally authorize him to do by a writing. Says the Supreme Court of the United States, 16 Peters, 116: "And if the principle be sound that a debtor may lawfully apply his property to the payment of such creditors as he may choose to prefer, he may certainly elect the time when it is to be done, so as to make it effectual. And such preference must necessarily operate to the prejudice of creditors not provided for, and cannot furnish any evidence of a fraudulent intention."

In that case it was alleged that the debtor had succeeded by his deed in putting off executions which were impending against him. "Wheeler's circumstances were extremely embarrassed, if not desperate, and he found impending over him two judgments amounting to nearly \$12,000, in the hands and under the control of Winter, whom he had certainly no reason to believe was friendly to him, and which judgments, if they could have been enforced to their full amounts, would have swallowed up the greater portion of his property. Was he not, under such circumstances, authorized by every principle of justice and honesty to secure as far as he could his *bona fide* creditors?"

The question recurs, were these preferences honest and fair? They were made to relatives, and this circumstance undoubtedly is of an unfavorable import. Such preferences are more readily assailed than those made in favor of strangers. But there is not a scintilla of proof in the case that those debts are not honestly due to preferred creditors. On the contrary, it distinctly appears that the money thus attempted to be secured was lent by them to Henry C. Shuster when he entered into business, and that with it he paid some of these very creditors for the goods originally purchased when he opened his store; and that he might reasonably consider himself, under the circumstances, especially bound in good faith and honor to see that these persons who

had trusted him without security under such peculiar circumstances, should not be the losers.

The only testimony to which we have been referred at all as tending to support the suspicion of *mala fides*, is to be found in the cross-examination of Henry C. Shuster, and we fail to see in that anything to justify the aspersion cast upon the honesty of his actions in this matter.

The case in 68 N. Y., 1, cited by the complainants' counsel, where an application was made for trustee process under the statute of the State upon the allegation that the debtor had purchased the goods with fraudulent intent, shows that the utmost extent to which the court went was to say: "Where the vendee purchases property on credit, knowing he is insolvent, without disclosing the fact, *and with intent not to pay for the property*, fraud may be affirmed." And the opinion declared that the facts there were such that a presumption of his intent not to pay might be inferred.

But the mere silence of a defendant as to his financial condition at the time of sales to him by complainants, even if he had then known himself to have been insolvent, is not sufficient to warrant a rescission of the sales for fraud. An honest though abortive purpose to continue business and pay for goods bought, is consistent with the vendee's knowledge of his insolvency, and the purchase is not fraudulent when made with such intent, though founded in delusive and unreasonable expectations.

In 4 Chan. Appeal, 625, *Alton vs. Harrison*, decided in 1869, where a deed securing five enumerated creditors, reserved the property in the hands of the grantor for six months, and excluded all other creditors, it appeared that the debtor at the time knew that a writ of sequestration was about to issue against him. The court say: "If the deed was executed by Harrison honestly, for the purpose of giving a security to the five creditors, and was not a contrivance resorted to for his own personal benefit, it must have effect."

In the case of *Powell vs. Bradlee*, 9 G. & J., 245, the fourth prayer of the defendant was in these words: "If the jury believe that at the time Tyson & Morris made the purchase

of Powell, they were largely insolvent, and knew themselves to be so, and concealed such insolvency, and the said Powell neither knew of such insolvency nor had the means of knowing it, then the sale is void." The appellate court said: "We do not think the court below erred in refusing the fourth prayer of the defendant. The prayer seems to have been founded on the idea that the sale was fraudulent, if the vendees knew themselves to be insolvent at the time of the purchase and did not communicate that circumstance to the vendors; knowing at the time that they were ignorant of the fact and had not the means of becoming acquainted with it. The law it seems does not sanction such an elevated tone of morality in mercantile dealings as would have warranted the granting of the prayer to the extent asked for by the defendant. Such a strict and rigid doctrine, considering the vicissitudes and changes incident to mercantile life, would go far to cramp the operations of trade and commerce, and has not received the countenance of courts of justice either in this State or elsewhere, as far as we have been able to ascertain. Moreover, the proceeds of the property purchased might have enabled them to fulfill their contract, and from anything which appears might have been intended to be applied to that purpose. There must have been *an intent not to pay at the time of the purchase.*"

If it be true that ninety per cent. of all merchants fail at some time of their mercantile lives, it surely is not astonishing that a man in Henry C. Shuster's position might honestly have supposed himself able to go on with his business notwithstanding his existing embarrassments, and we cannot see that anything more unfavorable can be imputed to him than bad management in this his first business venture.

It follows from these views that we sustain the provisions of the first assignment as ratified and corrected and amended by the second. In accordance with this decision the two preference creditors will be paid the amounts specified in the first deed, and other creditors of Henry C. Shuster are admitted to participate *pari passu* in the distribution of the residue after the payment of the expenses of administering

the trust. The bill of Wernwag and others, No. 7093, is dismissed with costs; and the assignees appointed by the order of the 11th of October, 1880, as receivers, are retained, and are required to settle their accounts in this court, upon the principles herein set forth.

Mr. Chief Justice CARTER dissented from the conclusion of the Court.

JAMES FORSYTH ET AL.

vs.

THE HIBERNIA BUILDING ASSOCIATION.

No. 7372.

{ Decided July 6, 1881.

{ JUSTICES WYLIE, MACARTHUR and HAGNER sitting.

F., a stockholder in a building association, borrowed a sum of money from the association, his wife, and the co-heirs with her, of a piece of land, joining in a deed of trust pledging the land to secure the loan. Afterwards the association undertook to foreclose the trust for an alleged default. Upon a bill filed by the grantors to restrain the sale and to compel the association to allow certain credits in their settlements of F.'s account, it was;

Held, that whatever might be the proper terms of settlement between F. and the association, the grantors were not bound thereby if those terms were in opposition to the provisions of the deed of trust; that they stood only in the position of sureties who have agreed to answer for the default of a debtor; that the measure of their liability was to be determined solely by the terms of the instrument creating it, and, if by these terms the proceeds of the sale upon default made are to be applied (after the payment of expenses and trustees' commissions) to the satisfaction of so much of the debt secured as remains due after deducting therefrom the value of F.'s stock, equity will, before the sale and for the purpose of ascertaining the right of the association to foreclose the trust, require this credit to be made upon F.'s indebtedness, although as between F. and the association such a credit might not be proper.

THE CASE is stated in the opinion.

W. F. MATTINGLY and D. O'C. CALLAGHAN for plaintiffs.

R. K. ELLIOT and J. F. RILEY for defendants.

Mr. Justice HAGNER delivered the opinion of the Court:

This is an appeal from a decree of the special term upon a bill filed by Forsyth and wife and the other complainants,

who are co-heirs with Mrs. Forsyth, and with her seized as tenants in common of certain lots of ground in the city of Washington.

The bill asked for an injunction to prohibit the sale of the property by the trustees named in three deeds of trust executed by the complainants to secure three loans made by the association to Forsyth. It appears that Forsyth was a member of the association, and as such, on three occasions, he borrowed, or, as it is called, bought, money from the association upon his shares of stock, the loans aggregating \$7,200.

The rules of the association require that all loans made by it shall be secured by the execution of a deed of trust upon real estate. Forsyth, the borrower, either had no real estate of his own or none which would be considered as affording adequate security, and to comply with the requirements of the association he obtained the consent of his wife and the other co-heirs of the land in question to pledge it by deeds of trust to secure the loans.

Forsyth, from time to time, made a number of payments to the association. Shortly before the filing of the bill he was informed that the sum claimed from him was very much in excess of the balance which, according to his calculation was actually due. This difference arose in great part from the circumstance that the association had not given him credit upon his loans for the full amount of the payments he had made at various times. According to the regulations of the society, each stockholder is pledged to pay at stated periods one dollar upon each share of stock owned by him. If he becomes a borrower or purchaser of money from the association, he is thenceforth required to pay an additional dollar upon each share. Forsyth claimed that in computing his indebtedness he should have received a credit for both of these dollar payments; whereas the association insisted that by the terms of their constitution and by-laws, properly construed, the additional dollar should not in such a case be credited to the borrower, but the benefit of its payment should inure to the members of the association who were not borrowers.

including a commission * * * * to the said trustees

Forsyth also claimed that he was entitled, if he desired to close out his interest and withdraw, to a credit upon his account for the present value of his shares of stock. This was denied by the officers, who insisted that according to the constitution in such a case the shares of stock did not constitute a proper credit, but that they were absorbed or merged for the benefit of the remaining members of the association. The difference between these modes of computation was very considerable. Forsyth insisted that, according to a proper statement of the account, he owed less than \$850, and this amount he paid into court to be applied as far as was necessary to the extinguishment and discharge of his loan.

The questions presented by this class of controversies are very difficult and complicated, and their solution depends in a great degree upon the peculiar provisions of the constitutions of the particular societies, which differ from each other frequently in important particulars. In the view which we take of this case, it is not necessary, nor would it be proper, that we should enter at large into a discussion of these questions as between Forsyth and the association.

The present suit is by the grantors in the several deeds of trust. No one of those grantors, except Forsyth, was at all indebted to the association at the time they united in these deeds. They, therefore, stand in the position of sureties who have agreed to become answerable for the default of a debtor. In such cases the responsibility of the sureties is not to be extended by implication or construction, but the measure of their liability is to be found in the instrument which creates it. By that they have agreed to be bound, and by its terms the extent of their responsibility is to be determined.

These deeds of trust all contain the following clause ;
 " Upon default made in the payment of any one or more of said monthly dues, or of the fines or forfeitures, &c., * *
 * * It shall be the duty of the trustees * * * * to sell said real estate * * * * and from the proceeds of the sale shall first be paid, to satisfy the expenses of sale,

* * * and, secondly, shall be paid to said treasurer *
* * * the said sums (\$1,200, \$2,000, and \$1,000 * *
* * *after deducting therefrom the value of the said stock as
ascertained in the usual way by said association at the time
said default as aforesaid shall have been made."*

It is manifest that if the trustees had sold the property, their plain duty would have been to apply the proceeds according to the provision just quoted, and in no other way. They, therefore, would first have deducted the expenses of the sale and their commission ; secondly, they would have paid to the association the balance remaining due by Forsyth, but that balance was to be the sum remaining after deducting therefrom the value of the said stock." If the trustees had undertaken to settle with the association without allowing the credits thus plainly provided for, a court of equity would inevitably have interposed to compel the performance by the trustees of this plain duty, upon complaint of the grantors in the deeds. To refuse to allow such a credit would have been undoubtedly a fraud upon the agreement, by which alone the grantors became liable to the association. And, inasmuch as this relief would have been given after the sale, we cannot see why the court should refuse to give the same relief at the present stage of the case, before the sale has been made.

The proper terms of settlement, as between Forsyth and the association, may depend upon principles by which the grantors are not to be bound, if they are in opposition to the provisions of the deeds of trust.

There is no proof in the case, properly presented to the court, indicating the value of the stock, for the statements presented at the argument, although apparently official in form cannot be considered as evidence in the cause. If those statements are correct, it would appear that after the credit of \$850 and the deduction of the value of Forsyth's shares of stock, the debt would be more than paid.

It will be necessary to remand the case that the proper valuation of the shares may be ascertained upon an audit ; and the decree below is reversed, and the case remanded for that purpose.

SAMUEL STRONG vs. MARGARET C. BARBOUR.

AT LAW. No. 14,051.

{ Decided May 31, 1881.

{ The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

1. Reference of a cause, by the Court, to one as "special referee" with directions to take and return the testimony adduced, and to report all the material facts "with his conclusions of law and his recommendations." The report was not under seal, was unaccompanied by a final finding and professed to be nothing more than a "recommendation." *Held*, not an award under the Maryland act of 1785 and Rule 53 of this court, and a judgment entered thereon reversed, and the cause remanded to stand before the court as it did before the reference.
2. An award ought to settle finally and conclusively the whole matter referred. It is contrary to the principles of a general reference that the court should take the award as far as it goes and supply all omissions by its decree. The award ought to be in itself a complete adjustment of the controversy submitted to the arbitrators.
3. Where a court, under the authority of law, assents to a reference of a case to an arbitrator, it abdicates, *pro hac vice*, its own judicial functions, to the arbitrator; and his award, if conformable to the law and the rules regulating the subject, is taken as of equal force with a decision of a competent tribunal, needing only the formal ratification of the court to stand as a judgment of the tribunal itself. But this special power thus confided to the arbitrator, must be exercised in conformity to the law and the rules of court, and on these conditions alone will it be considered as an equivalent to the finding of the court and jury.
4. A party cannot be deprived of the right to have his case passed upon by a jury unless waived by a regular reference to arbitrators, and its equivalent obtained by a proper final award.

THE CASE is stated in the opinion.

ENOCH TOTTEN for plaintiff.

PETER & DARNEILLE for defendant.

Mr. Justice HAGNER delivered the opinion of the court.

This was an action of trover brought by the plaintiff to recover a sum of money claimed to be due by the defendant on account of the unlawful conversion of certain certificates and bonds, which it is alleged were entrusted to the defendant as collateral security on the plaintiff's notes, and which were improperly sold and applied by the defendant.

After the case was at issue, a reference was made of this and three other cases brought by the plaintiff respecting the same cause of action, to Mr. James G. Payne as "special referee," with directions to take the testimony adduced by the respective parties in the several causes and return the same in one of said causes, and further that "the said referee

shall make a separate report in each case, stating all the material facts with his conclusions of law thereon, and his recommendations, and return the same to this court with all convenient speed."

Testimony was taken before the referee in said causes, and a report filed by him in this case, embodying what may be called "his conclusions of law," and concluding as follows, with what was probably designed as "his recommendation: "

"Acting upon this presumption, there would appear to be due from the defendant to the plaintiff the sum of \$771.31, and interest, as shown in 'schedule A' attached to this report."

Notice was given of a motion to the court "to confirm the award of the special referee and enter judgment thereon for the plaintiff."

Subsequently a number of exceptions to the report were filed on behalf of the defendant, and after hearing upon the exceptions judgment was entered by the court for the sum recommended by the referee, and the case comes here on appeal from this judgment of the court.

We are of opinion that the judgment below was improperly entered. It seems to have been assumed that the reference spoken of was in the nature of a reference to an arbitrator, and that the report is to be regarded as an award within the Maryland act of assembly of 1785 and rule 53 of this court. Such, however, is not our understanding of the matter. What may have been the purpose of the parties in making this reference we are not prepared to say, but the report is wanting in most of the characteristic features which are held essential to give validity to an award. The referee does not profess to have acted as an arbitrator. His report is not returned as an award under his seal, and above all it is not accompanied with a final finding of the matters referred. It professes to be nothing more than a "recommendation;" and the law is well settled that "the award itself ought to settle finally and conclusively the whole matter referred. It is contrary to the principle of a general reference that the court should take the award as far as it

goes and supply all omissions by its decree. The award ought to be in itself a complete adjustment of the controversy submitted to the arbitrators." 11 Wheaton, 446, *Carnochan vs. Christie*.

Where a court, under authority of law, assents to a reference of a case to an arbitrator, it abdicates, *pro hac vice*, its own judicial functions to the arbitrator, and his award, if conformable to the law and rules regulating the subject, is taken as of equal force with a decision of a competent tribunal, needing only the formal ratification of the court to stand as a judgment of the tribunal itself.

But this special power thus confided to the arbitrator, must be exercised in conformity to the law and the rules of court, and on these conditions alone will it be considered as an equivalent to the finding of the court and jury.

In this case we have seen these essentials are wanting, and there is no power in the court to give efficacy to the recommendations by supplying omissions, and thus to deprive the defendant of her right to have her case passed upon by a jury. But that right might have been waived by a regular reference to arbitrators, and its equivalent obtained by a proper final award. If this report could be considered as an award in form, which it does not pretend to be, nevertheless the judgment of the Supreme Court in the case above cited would be applicable here: "This award, therefore, ought to be set aside and the decree affirming it reversed, and the cause remanded to the circuit court. The case will then stand before that court as it did previous to the submission."

In this view of the case it is unnecessary to express any opinion as to the numerous other questions argued at bar.

Judgment reversed and case remanded for trial.

IN THE MATTER OF THE APPEAL OF CLARK FISHER FROM THE
DECISION OF THE COMMISSIONER OF PATENTS.

Patent Appeals, Doc. 1, No. 56.

{ Decided June 16, 1881.

{ The CHIEF JUSTICE and Associate Justice WYLIE sat in this case.

1. A mere aggregation and bringing together of old devices or instrumentalities is not a patentable invention unless some new result is obtained.
2. The result of holding firmly the ends of railroad rails by means of screws or bolts, and by a plate under the ends is well known, and the simple adoption and application of a ribbed plate with the bolt screwed to its place between the ribs is only the application of two old devices without the attainment of any new result.

THE CASE is sufficiently stated in the opinion.

WM. C. STRAWBRIDGE and J. BONSALL TAYLOR, for Clark Fisher, cited the following:

If the patentee borrowed the idea of the different parts which go to constitute his invention, and for the first time brought them together into one whole, and that whole is materially different from any whole that existed before, then he is the original and first inventor, and is entitled to a patent therefor. *Many vs. Sizer*, 1 Fisher, 17.

If not only all the primary elements, but all the sub-combinations existed in different machines before, but were never brought together to constitute one and co-operating to produce one, and the inventor bring them together by invention, producing a useful result, he is entitled to a patent for such combination and arrangement. *Howe vs. Morton*, 1 Fisher, p. 586.

If the idea of a combination is a meritorious invention, it will be deemed new, although a competent mechanic could easily adapt the parts. *Brown vs. Whittemore*, 5 Fisher, 524.

And see the doctrine laid down in *Lee vs. Blandy*, 2 Fisher, 89; *Union Sugar Refinery vs. Matthiesen*, 2 Fisher, 601; *Merriel vs. Yeomans*, XI O. G., 970; *Middletown Tool Co. vs. Judd*, 3 Fisher, 141; *Miller vs. Peters; Mfg. Co. vs. Du. Brul*, XII O. G., 351.

Mr. Justice WYLIE delivered the opinion of the court.

This application was filed in the Patent Office January 24, 1879. The application was examined by the primary examiner who made an adverse report. An appeal was taken to the examiners-in-chief. The applicant amended his claim and the application was rejected by the examiners-in-chief; he again amended his claim, and again the primary examiner investigated and again made an adverse report. Two or three times at least these amendments took place, until the application was reduced to its present shape, when it was examined by the primary examiner who rejected it. An appeal was then taken to the examiners-in-chief, and they rejected it the second time. An appeal was then taken to the Commissioner of Patents and he rejected it. These rejections by the Patent Office seem to have been based upon the want of novelty, the invention as claimed having been anticipated by two or three prior inventions in this country and abroad. It is not worth while to refer to these prior inventions, because the decision here would then be based upon technical grounds in examination and comparison with the claims of the prior inventions.

The case as it appears here is this. The petitioner erases all the claims heretofore presented, and substitutes the following :

“The combination of the sole piece provided with ribs upon its under surface and with flanges upon its upper surface, the rails, and the forelocks by means of single bolts, the arrangement being such that the bolt heads are prevented from turning by the ribs, while the forelocks are held rigid between the flanges and webs of the rails, substantially as shown and described.”

Now, a bolt with a screw and a nut are old mechanical implements, and a sole plate placed under the two ends of the rails is an old claim. A groove in a sole piece or plate is an old invention. A groove used in connection with a nut so as to prevent the nut from turning is likewise an old invention.

The invention in this instance consists in ribs to the sole piece, on the under surface of the sole piece. It occurred to this gentleman that he would have the sole piece rolled with grooves, because a sole piece rolled with grooves on the under side and a corresponding rib on the upper side would be a stronger plate than a flat plate with a groove cut out of it, and the rolled groove would serve the purpose of holding the nut to this plate as perfectly as the groove cut would do. And that is the sole invention for which a patent is claimed.

Now, he claims that the rolled rib upon the upper surface and a corresponding groove in the under surface have never been used in that way; and that it is a stronger plate than any other, and that the use of the plate in connection with the nut which holds the bolt firmly is an improvement. The Commissioner decided that it was no invention, because it had been anticipated by prior inventors; but we think that there is still another fundamental objection to it. Everybody knows that a piece of iron rolled with ribs makes a stronger piece of plate than a flat piece of iron with a groove cut out of it. There was no invention in that. It was known to everybody, and the only patentable quality which the petitioner claims here is the use of such a plate as that in connection with the screw. Now this seems to us not to be a patentable discovery at all. It is a mere aggregation of things well known to any mechanic. There is no new result from the use of this combination. The result of holding firmly the ends of railroad rails by means of screws or bolts and by a plate under the ends is well known, and the simple adoption and application of a ribbed plate with the bolt screwed to its place between the ribs, is only the application of two old devices.

Now, it is not every combination of well-known things that entitles a party to a patent as an inventor. A mere aggregation and bringing together of old devices or instrumentalities is not an invention unless some new result is attained, and here there is no new result. In *Hailes vs. Van Wormer*, 20 Wallace, 353, the Supreme Court, by Mr. Justice Strong, say: "It must be conceded that a new combination,

if it produces new and useful results, is patentable, though all the constituents of the combination were well known and in common use before the combination was made. But the results must be a product of the combination, and not a mere aggregate of several results each the complete product of one of the combined elements. Combined results are not necessarily a novel result, nor are they an old result obtained in a new and improved manner. Merely bringing old devices into juxtaposition, and there allowing each to work out its own effect without the production of something novel, is not invention."

And in the prior case of *Stimpson vs. Woodman*, 10 Wallace, 117, Mr. Justice Nelson says, delivering the opinion of the court (I read from the syllabus, which is a correct synopsis of the opinion): "Where a roller in a particular combination had been used before without designs on it, and a roller with designs on it had also been used in another combination, it was not a patentable invention to place designs on the roller in the first named combination. Such a change, with the existing knowledge in the art, involved simply mechanical skill, which is not patentable.

The petitioner in that case asked for a patent for the use of a roller with designs upon it for the purpose of making and impressing figures upon leather. Before that workers in goat skin were in the habit of folding over the inner part of the skin upon the outer part when it was partially in an undressed condition, and subjecting it to pressure, and by so doing impressed a roughness upon the skin which it preserved afterwards. It occurred to this applicant that if he would take a roller and have lines and dots marked upon it, he might produce this rough impression upon the skin in a new way by the use of the roller. The roller had never been used in that way before, although a plain roller for the purpose of smoothing the skin and rollers with designs upon them, and marks, and dots and figures, had been used for other purposes anterior to that time; but he was the first man to whom it occurred that a roller marked, dotted, and lined and roughened might be used for the purpose of finish-

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ing the skin and giving it the rough appearance which we see in morocco; but the Supreme Court said there was no invention in that. Rollers had been used before, and smooth rollers had been used in dressing skins, and rollers with designs upon them had been used in other things, so that he merely applied the use of the figure roller to this particular article of skins. The court held that it was not a patentable invention, that it was merely a new application of what was known before.

A very ridiculous illustration of the kind of invention that is here claimed was once presented to this court, on appeal from the Patent Office.*

It occurred to a man that a balloon might be made a useful thing to merchants, mechanics, &c. His idea was to have a balloon swung across the street, with handbills on it and devices to attract attention, so that persons engaged in business who would pay him for his invention might use the balloon. Everybody driving or walking on the street would have his attention drawn to the balloon and to the flags and streamers attached to it, and would thus be induced to look at the advertisements. He thought it would be a very good method of advertising, but the Patent Office rejected his application. He appealed to this court, and we affirmed the decision, not because it was not a novel concern—for such an idea had never entered into any other man's head—but because balloons had been known, and advertisements had been known, and handbills had been known, and it was a mere combination of well-known things without any new result.

For this reason, as well as for the reason given by the Patent Office, that this invention, if it was an invention at all, had been anticipated, we think that the decision of the Commissioner ought to be affirmed.

*In *Re Gould*, 1 Mac A., 410.

THE ALEXANDRIA CANAL RAILROAD AND BRIDGE COMPANY

vs.

THE DISTRICT OF COLUMBIA.

IN EQUITY. No. 4444.

{ Decided June 21, 1881.

{ The CHIEF JUSTICE and Justices MAC ARTHUR and HAGNER sitting.

1. Whenever, on any fair construction of the legislation under which an exemption from taxation is claimed, there is a reasonable doubt whether the claim is made out, that doubt must be solved in favor of the sovereignty. In other words the language used must be of such a character as when fairly interpreted leaves no room for controversy.
2. The act incorporating the Chesapeake and Ohio Canal Company (assented to by Congress, March 3, 1825.) declared its property forever exempt from taxation. By a provision of the act Congress had power to authorize the extension of the canal "into or through the District of Columbia * * * * upon the same terms and conditions and with all the rights and privileges and powers of every kind whatsoever that the company incorporated by this act have *to make* the Chesapeake and Ohio canal." Afterwards the Alexandria Canal Company was incorporated by Congress and authorized to construct a canal from the terminus of the Chesapeake and Ohio canal in Georgetown across the Potomac river. Under this charter a canal was conducted across the Potomac by an aqueduct, supported upon piers. In May 1866, certain parties became lessees of the property. Subsequently, the lessees conveyed all their rights to complainants, a body politic. Later (July 1868,) the assent of Congress was given to the construction by complainants of a bridge over the aqueduct. The District of Columbia having assessed this bridge for taxation, complainant filed their bill to enjoin the enforcing of the tax on the ground that the exemption from taxation granted the Chesapeake and Ohio Company had been transmitted to complainants by their charter and the several acts of Congress.
Held, that the rights, privileges and powers communicated to the Alexandria Canal Company were those which the Chesapeake and Ohio Company had *to make* the canal and that these might be exercised quite independently of any exemption from taxation, and could not be held to include any immunity therefrom.
Held also, that even if the Alexandria Canal Company had been entitled to immunity from taxation, it could not be claimed by its lessees, as the exemption from taxation was a privilege of the company itself and does not pass to purchasers of its property and franchises.
Held also, that where an act incorporating a company authorizes it to construct certain works and forever exempts its property from taxation, a subsequent act (unaccompanied by an exemption from taxation) authorizing the company to construct other works, which are in no sense an appropriate part of the first or within the purposes or contemplation of those who granted the original franchise, the new property thus created cannot be fairly included as coming under the grant of exemption from taxation in the original act.
3. The whole bed of the Potomac river with all the islands therein up to high-water mark, on the Virginia shore is within the explicit terms of the Maryland Charter and therefore the whole of the Alexandria Canal and Bridge Company's bridge beginning at the southern terminus of Lingan street in Georgetown, and extending across the river to high-water mark of the Virginia shore, is within the jurisdiction of the District of Columbia.

4. A bridge firmly attached to and incorporated with the stone work of an aqueduct whose piers extend a great depth below the bottom of the Potomac river and are fastened to the solid rock cannot be considered as personalty or anything else than real estate within the meaning of the tax laws.
5. Although an incorporated company has not for thirty years been charged with taxes upon its property, the court will nevertheless sustain the right to a tax, if it be a legal one, when the subject is finally brought to its attention.
6. The mere cost of the planks of a bridge is not the only element to be taken into consideration in making an assessment; the use permitted to be made of the property under the franchise may enter as a constituent into the valuation.
7. Where there is an appeal board authorized and required to sit and hear all complaints as to over-valuation or impropriety of assessments and to revise the same, and its action is declared to be complete and final, persons who wilfully neglect to avail themselves of the opportunity so amply afforded them cannot expect a court of equity, after long delay, to relieve them from the consequences of their own laches. Especially will the court not substitute its own judgment for that of the tribunal expressly created for that purpose.
8. A bridge which lies partly in the District of Columbia, and partly in the state of Virginia, cannot be assessed by the District upon its entire length; only that portion within the District can be assessed, otherwise the assessment is illegal and a bill to enjoin a sale of the property by the District authorities for non payment of the tax will be sustained.
9. Where an answer to a bill filed for a discovery contains admissions in favor of the complainant they have the force of testimony in his favor.
10. Section 3224 of the Revised Statutes of the United States declaring that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court," applies only to taxes levied by the United States, and has no application to taxes levied by the District of Columbia, although under authority of the United States.
11. The rule that the mere illegality of a tax is no ground of itself for the interposition of a court of equity, but that there must exist in addition, special circumstances bringing the case under some recognized head of equity jurisdiction, applies only to taxes levied by the sovereign; it would seem not to be properly applicable to the case of an illegal tax levied by a municipal corporation.

The case is stated in the opinion.

H. H. WELLS for complainant.

RIDDLE & MILLER for defendant.

Mr. Justice HAGNER delivered the opinion of the court.

This is an appeal by the District of Columbia from the decree of the chancellor of the 12th of November, 1880, perpetually enjoining the Commissioners of the District and their successors from selling or advertising for sale the property mentioned in the bill of complaint on account of the several tax levies and assessments mentioned in the

case, and from setting up the said levies and assessments, or attempting to collect or enforce the same or any part thereof.

The property referred to is the bridge structure across the Potomac river from the city of Georgetown to Virginia. The right of the Commissioners of the District of Columbia to collect the taxes therein referred to is contested upon a variety of grounds set forth at large in the bill ; and which will now be considered in turn.

First. It is insisted on the part of the Bridge Company that the property in question is exempt from taxation by express provision of law.

The Chesapeake and Ohio Canal Company was incorporated by the State of Virginia in 1824, and by the State of Maryland in 1825. By the terms of these statutes the charter was not to become operative until the Congress of the United States should give its assent to its provisions ; and this ratification and assent were expressed by the act of Congress approved March 3, 1825. Section 9 of the charter declared “ that the said canal and all other works aforesaid or required to improve the navigation thereof at any time hereafter, with all their profits subject to the limitations herein provided and to none other, shall be, and the same are hereby vested in the said stockholders, their heirs and assigns forever, as tenants in common, in proportion to their respective shares, *and be forever exempt from the payment of any tax, imposition, or assessment whatsoever.*”

By the 21st section of the charter it was further provided that the right to the waters of the Potomac for the purpose of any lateral canal which the States of Virginia or Maryland might authorize to be made in connection with the said canal, was reserved to the said States respectively ; “ that the Government of the United States should retain the power to extend the said canal in or through the District of Columbia on either or both sides of the Potomac river,” and that before the charter should take effect “ the Congress of the United States should authorize the States of Virginia and Maryland, or either of them, to take and con-

tinue a canal from any point of the above-named canal, or the termination thereof, through the territory of the District of Columbia, or any part thereof, to the territory of said States, or either of them, in any direction they may deem proper *upon the same terms and conditions and with all the rights and privileges and powers of every kind whatsoever that the company incorporated by this act have to make the Chesapeake and Ohio Canal.*"

The eastern terminus of the canal route remained in Georgetown, until Congress, by the act of 26th May, 1830, incorporated the Alexandria Canal Company authorizing the construction of a canal from the line of the Chesapeake and Ohio canal in Georgetown, across the Potomac river, to a point on the river in or near the city of Alexandria. Under that charter a canal was conducted across the Potomac at Georgetown upon an aqueduct supported upon piers, built on rock in the bed of the river, and upon stone abutments. The Alexandria Canal Company for many years operated the canal, until the 16th of May, 1866, when the Board of Public Works of Virginia, under authority of law, united with the city of Alexandria and with the Alexandria Canal Company, in a lease of the canal, its aqueduct, locks, banks, and all other, its property, rights, and franchises, unto Henry H. Wells, Philip Quigley, William W. Dungan, their heirs and assigns, for ninety-nine years from that date. This lease and conveyance were ratified by act of the General Assembly of Virginia in the following year, and the lessees were thereby empowered to erect, build, operate, and maintain across the Potomac river, over the stone piers on which the aqueduct rested, a new aqueduct of wood, iron, or stone, and in connection therewith a bridge of the same material for the passage of persons, animals, wagons, &c.

On the 27th of July, 1868, the assent of Congress was given to the construction by the said lessees of the bridge over the aqueduct and piers, for the passage of railroad tracks, persons and vehicles, and the act authorized the collection of tolls by the lessees from persons using the bridge.

On the 18th of October, 1867, the complainants were chartered and became a body politic under the laws of the State of Virginia, by the corporate title of the Alexandria Canal Railroad and Bridge Company, and, after its incorporation the said Wells, Quigley, and Dungan, with the consent of the Alexandria Canal Company, conveyed all their rights as lessees to the complainants.

Is the property in question exempt under a proper construction of these statutes?

The exemption of all the property of the Chesapeake and Ohio canal by the original charter is ample and explicit. The legislatures of the different States, in an unmistakable manner, declared that the property of the canal should be forever free from the payment of any taxation, imposition or assessment whatsoever, and Congress assented to that exemption. But in our opinion this exemption cannot be properly construed as embracing the property of the complainants. It is an established principle that the power of taxation is the highest attribute of sovereignty; that its existence will always be presumed; that, wherever an exemption from taxation is claimed, the language surrendering the power must be clear and unmistakable; that a State cannot strip itself of this most essential power by doubtful words; that as its existence rests upon necessity and is inherent in every sovereignty, wherever on any fair construction of the legislation invoked, there is a reasonable doubt whether the claim for the exemption is made out, that doubt must be solved in favor of the sovereignty. In other words, that the language used must be of such a character as, fairly interpreted, leaves no room for controversy on the point.

Now plainly such is not the case in the present instance. The charter of the Alexandria Canal Company of May 30 in many particulars is copied from the original charter of the Chesapeake and Ohio canal, but in section 9 of the charter of the Alexandria Company, corresponding with section 9 of the original charter, the words of exemption from taxation are studiously omitted, although the rest of the section is literally copied. See 6th Stats. at Large, 422. There can

be no pretence that the exemption contended for is granted in *express* terms. And by the decisions of the highest courts of the country, the existence of a doubt on the point, settles in our opinion, this contention conclusively against the complainants. The most recent utterance of the Supreme Court on the subject was its opinion at the October term, 1880, in the unreported case of the Annapolis and Elk Ridge Railroad Company *vs.* The County Commissioners of Anne Arundel County. The railroad company was incorporated by an act of the general assembly of 1837. By section 5 of this charter the company was invested with all the rights and powers necessary to the construction and repair of a railroad from the city of Annapolis to connect with the Baltimore and Washington road, "and for this purpose the said president and directors may have and use all the powers and privileges and shall be subject to the same obligations that are provided in sections 14 to 23 inclusive of the act entitled an act to incorporate the Baltimore & Ohio Railroad Company." Section 18 of the charter of the last-named company contained this provision: "and the shares of the capital stock of the said company shall be deemed and considered personal estate, and shall be exempt from the imposition of any tax or burthen by the States assenting to this law." It had uniformly been held by the Maryland courts that under this clause the property of the Baltimore and Ohio Railroad Company was exempt from taxation.

In like manner it was insisted on behalf of the Annapolis company, that under these statutes, its property was exempted from taxation, and no claim to the contrary had been made from 1837 to 1876. But the Supreme Court held that the Annapolis and Elk Ridge Company was invested with all the rights and powers necessary to the construction and repair of a railroad and *for that purpose* was to have and use all the powers and privileges contained in the enumerated sections of the Baltimore and Ohio charter; that this was not a grant of all the powers and privileges of the latter company but only of such as were necessary to carry into effect the objects for which the new company was incorporated, and

consequently, that only such of the privileges of the old company could be enjoyed by the new as were appropriate to the work the new company was authorized to do ; that exemption from taxation could not be considered as one of the privileges granted, as it was not necessary either to the construction, repair or operation of a railroad ; and hence that the power to tax the property of the Annapolis and Elk Ridge Railroad Company could not be considered as having been relinquished by the State, either by express terms or by any fair implication.

To the same effect was the decision of this court in the case of the Baltimore and Ohio R. R. Co. *vs.* The District of Columbia, reported in 3 Mac Arthur, 122.

In February, 1831, Congress passed a law authorizing the extension into the District of Columbia, by the Baltimore and Ohio Railroad, of a lateral railroad in connection with the main branch located from the city of Baltimore to the Ohio river in pursuance of their said act of incorporation, and the statute proceeded, "and the said Baltimore and Ohio Railroad Company are hereby authorized to exercise the same powers, rights and privileges and shall be subject to the same restrictions in the extension and construction of the said lateral railroad into and within the said District as they may exercise or are subject to under and by virtue of their said charter or act of incorporation in the construction or extension of any railroad in the State of Maryland, and shall be entitled to the same rights, compensation, benefits and immunities in the use of the said road and with regard thereto as are provided in their said charter."

It was claimed by the railroad company that this operated an exemption from taxation by Congress of the property of the company in the lateral road within the District of Columbia. But it was held by this court that such was not its effect, either by express terms or by necessary implication, and that its property lying within the District of Columbia was subject to taxation in the same manner as the property of private individuals.

The 21st section of the charter of the Chesapeake and

Ohio Canal Company declares that the canal which Congress may authorize to be constructed from the terminus of the Chesapeake and Ohio through the District into Virginia, shall be continued "upon the same terms and conditions and with all rights and privileges and powers whatsoever that the company incorporated by this act have to make the Chesapeake and Ohio canal." The rights, privileges and powers which it is thus stipulated are to be communicated to the new canal are those which the original canal had to *make* the Chesapeake and Ohio canal. The powers to *make* the canal may be exercised quite independently of any exemption from taxation. Canals may be and generally are made without any such exemption, and the principle announced by the decisions in construing claims of exemption require us to decide that the privileges and powers secured to the new canal cannot be held to include an immunity from taxation.

But if the statutes which we have been considering could be held to have exempted the Alexandria Canal Company from taxation, still such exemption would not exonerate the property from assessment in the hands of the present holders. In virtue of the act of the General Assembly of Virginia of February, 1866, the canal company has transferred to the lessees above named all its property and franchises, and it has been held repeatedly by the highest courts that such transfer does not carry with it an immunity from taxation in the hands of the new proprietors. Such was the decision in *Morgan vs. Louisiana*, 93 United States, 221, and in *Railroad Company vs. The County of Hamblen*, 102 United States, 277.

In the first of these cases it was held that where the property and franchises of a railroad company were sold under a decree, the immunity from taxation of the property of the company guaranteed in the act of incorporation did not accompany the property in its transfer to the purchaser, since the immunity from taxation in such case was a privilege granted to the company itself and not transferable. In the latter case it was held that where, under a decree to

enforce a statutory lien retained by the State upon the property, real and personal, stock and franchises of a railroad company, the property and franchises were sold, the property was thereafter subject to taxation under the laws of the State, and that the immunity therefrom, possessed by the company, did not pass to the purchaser. It is a circumstance not without significance, that the lessees covenant by their articles of agreement to pay all taxes upon the property leased them by the canal company.

Again. It was no feature whatever of the original grant of incorporation to the Alexandria Canal Company that it should maintain a bridge for passengers, vehicles or railroad cars over the top of the aqueduct carrying their canal across the river Potomac. A railroad or foot bridge was in no sense an appropriate part of a canal, or within the purposes or contemplation of those who granted the franchise to the company. These lessees, by the acts of Virginia and of Congress, have been entrusted with a further and additional privilege not enjoyed by the lessors under whom they claim. If the canal company itself, by subsequent legislation, unaccompanied by an exemption from taxation, had been authorized to construct this bridge, the new property thus created could not have been fairly included under a grant of exemption of the property of the canal; and still less could the right of the sovereign to exact taxes be presumed to be waived in favor of the lessees.

We are, therefore, clearly of the opinion that there is nothing in the legislation relied on which exonerates the complainants from taxation.

Second. It is insisted in the bill that the property upon which this tax is sought to be levied is not within the jurisdiction of the District of Columbia, and for this reason is not assessable by the District authorities.

The complainants are the owners of the aqueduct and canal which is carried over it, extending from the Chesapeake and Ohio canal in Georgetown across the Potomac river to the Virginia shore. The wooden bridge in question is supported upon a Howe truss resting on the piers over the top

of the canal. This wooden bridge begins at the southern terminus of Lingan street in Georgetown, crosses the Chesapeake and Ohio canal to the first or northern abutment of the aqueduct, and up to that point is all within the limits of the city of Georgetown. It then crosses over the water of the river, and from high water mark on the Virginia shore extends by an elevated structure of some six hundred feet in length to the level ground in Virginia. There can be no question that the whole of the structure from the commencement in Georgetown to high water mark on the Virginia shore, is within the jurisdiction of the District of Columbia.

By reiterated decisions it has been perfectly settled that the whole bed of the Potomac river, with all the islands therein, up to high water mark on the Virginia shore are within the explicit terms of the Maryland charter. An interesting point of grammatical construction in the Latin of the original charter demonstrates this. In describing the boundary, the charter declares that the line should pass from Delaware bay in a right line by the fortieth degree of north latitude westwardly, "unto the true meridian of the first fountain of the river Potomac; thence verging towards the south into the further bank of the said river, and following the same on the west and south unto a certain place called Cinquack," &c. In the English translation, the expression "the same" may be equally applied to the bank, or to the river. In the latter case the line would be the middle thread of the river, which would have divided it equally with the State of Virginia. But the language in the Latin of the charter is "*ad ulteriorum dicti fluminis ripam, et eam sequendo*," &c.; and the use of the feminine relative pronoun *eam* shows that *ripam*, which is feminine, was the antecedent referred to rather than *flumen*, which is neuter. Whatever rights Maryland had in the river Potomac within the District of Columbia have devolved upon the District.

Third. By the act of the 20th of June, 1874, the District government was only authorized to levy a tax upon *real estate* within the District, and it is insisted upon the part of the complainants that this bridge cannot be considered as

coming within that description. If such is the case, the tax levied under the act of 1874 would be illegal. In our opinion the bridge is realty within the meaning of the law. Things real consist of lands, tenements and hereditaments. Corporeal hereditaments are confined to land which, according to Lord Coke, includes not only the ground or soil, but everything attached to the earth, whether by the course of nature, as trees, &c., or by the hand of man, as houses and other buildings. 3 Kent, [528]; 1 Coke Litt., [197, a.] According to all the authorities this definition embraces the property in question.

In 68 N. Y., 554, *Smith vs. The Mayor*, a pier in a river is held to be real estate within the meaning of the tax laws. See also *State vs. Northern Central Railway Co.*, 18 Md., 217, and *Northern Central Railway vs. Canton Co.*, 30 M., 354. In the latter case it was held that the rails fastened to the road-bed of a railroad were real estate. In *Snedeker vs. Waring*, 12 N. Y., the court held that a statue placed upon a pedestal built some distance in the earth, not secured to the pedestal except by its own gravity, was to be considered part of the real estate, so as to pass to a purchaser under a trust deed of the land, as against a purchaser under a judgment levied upon the statue as personalty.

The piers supporting this aqueduct extend down a great depth below the bottom of the river and are fastened to the solid rock. The wooden bridge is firmly attached to and incorporated with the stone work, and it would be impossible that it could be considered as personalty or anything else but real estate within the meaning of the tax laws. The taxes for the subsequent years are levied under a later statute which authorizes the assessment of personal as well as real estate, and this point is not of importance as respects the taxes for these years, as the property, if assessable at all, was sufficiently assessable under one designation or the other.

Fourth. It is contended on the part of the complainant that the proceeding of the assessors and District authorities in respect of this tax were so imperfect and faulty that the court should enjoin their collection. We have been re-

peatedly reminded in the argument that these complainants are non-residents, and it seems to be supposed that they are entitled upon this ground to special favor. The courts have had no difficulty in some of the States in answering the argument made in support of legislation which has attached additional burdens to the property of non-residents, that such inequality was just, in view of the fact that the absentee renders no personal service to the government by way of militia or road duty or as a voter ; and that those who protect his property in his absence should bear a lighter burden than the absentee, but the decisions have held that all such burdens should be equal against all property holders, and such was the special provision of the act establishing the District government. But surely there is no warrant for the contention that a non-resident should be dealt with in this particular with more leniency than the resident.

It is averred that for thirty years this company was not charged with taxes upon its property. This circumstance cannot avail if the tax is a legal one. In the case of the Annapolis & Elk Ridge Railroad Co. forty years had intervened, and in the case in 3 Mac Arthur, Baltimore & Ohio R. R. Co. vs. The District, more than twenty years had passed without the claim of taxation, but the court nevertheless sustained the right to tax when the subject was finally brought to their attention. The fact that the complainants have been so long exonerated from this burden should make them the more willing and able to pay at this time.

The assessment of this property upon the books of the corporation is in these words : "Alexandria Canal Company ; Beatty, Peter, Threlkeld & Deakin's addition ; valuation, \$75,000 ; wooden bridge across the Potomac." It is insisted in the bill that the amount of this assessment represents a grossly exaggerated valuation, as appears from the evidence in the case, which shows that the entire cost of the bridge was about \$27,000. It is hardly necessary to cite authorities to show that it is not competent for a court, in a proceeding like the present, to examine the question whether the assess-

ment of property was too high. In the language of the Supreme Court, 2 Otto, 612, *State Railway Cases*: "Perfect equality and perfect uniformity of taxation as regards individuals or corporations, or the different classes of property subject to taxation, is a dream unrealized." "If there is an excessive estimate of the value of the franchise, or capital stock, or both, it is by error of judgment in the officers to whose judgment the law confided that matter; and it does not lie with the court to substitute its own judgment for that of the tribunal expressly created for that purpose." And if the court possessed the power to reappraise, there is nothing before us from which we could arrive at a decision, or affirm that the appraisement was too high. It surely could not be considered just to assess the bridge at the mere cost of the planks. Many authorities show that the use permitted to be made of the property under the franchise enters as a constituent into the true valuation. In the words of this court, in 2 Mac Arthur, 192, *Robinson vs. Cook*: "We are of opinion, that as the complainant had an opportunity to appeal from the assessment, if there was any error in the valuation, to the board of appeal, she ought to have pursued that course." See, also, 2 Mac Arthur, 562, *Alexander vs. Dennison*.

Whatever adverse criticisms may have been made, from time to time, upon the laws passed by the Legislative Assembly during its brief existence, its acts respecting the assessment of property seem to have been inspired by a desire to do full justice to the property owner where an assessment was incorrect. The acts of 1st session of 1871, ch. 23, and the amendments to that law, make it the duty of the assessors "to personally inspect and examine all real estate" within their districts, and to ascertain from each individual the nature of his property, and return the name of the owners, and every person or corporation or association is required, within fifteen days after notification by the superintendent, to furnish a corrected list of all property, filling up the blank forms, which it is the duty of the assessor to leave with each property owner. A board of appeal is created

which is to sit at a designated time, after public notice in not less than three newspapers, of the time and place of its session. By one of the laws this board is to remain in session 100 consecutive days in every third year, and 30 days during the intervening years. The appeal board is authorized and required to hear all complaints as to overvaluation or impropriety of assessment, and to redress the wrongs complained of, and the law declares their action shall be complete and final. The superintendent of assessments and taxes, after the revision by the board of appeal, is to prepare in duplicate complete and accurate lists, giving alphabetically the names of all parties assessed, with a description of their property, one of which lists he is to retain and the other is to be lodged in the office of the collector. Immediately after the levy is completed, it is made the duty of the tax-collector, who is also acting under oath, after giving bond, to send an account of the taxes levied to each property-holder, notifying him that the tax must be paid within a designated period under penalty, and within sixty days after the expiration of this period, the collector is required to publish a complete list of arrears of taxes, and make sale of the property of delinquents, and the act declares that no sale thus made shall be void because of a failure to comply with any matter of form.

These acts of the legislative assembly are recognized by several acts of Congress; among others, by the act of the 20th of June, 1874, ch. 113, of 1875, ch. 162, the act of the 3d of April and 19th of June, 1878.

It is evident from an examination of these acts, that a property owner within the District could scarcely remain in ignorance that an assessment had been made upon his property and that he was required to pay a tax, and, if persons with a full opportunity to complain of any injustice committed by the assessors, wilfully neglect to avail themselves of the opportunity so amply afforded them, they cannot expect a court of equity, after long delay, to relieve them from the consequence of their own laches.

In *O'Neal vs. The Virginia and Maryland Bridge Company*

at Sheperdstown, 18th Maryland, 1, the bridge company applied to an equity court to enjoin the county commissioners of Washington county, Maryland, from selling its property for the payment of State and county taxes levied on the bridge. By the Maryland law similar duties to those prescribed by the acts of the legislative assembly of the District, were enjoined upon the county assessors. Among others they were required to make an alphabetical list of the property owners, so that persons interested could readily discover whether they were charged with taxes. In that case the property was entered on the assessors' book in the name of the Potomac Bridge Company instead of the Virginia and Maryland Bridge Company, at Sheperdstown, the actual name of the corporation. But the court held that as the corporation had knowledge of the assessment, and there was no reason why they did not go before the commissioner and have the error as to the name corrected, equity could not interfere in its behalf; that tax assessments ought not to be vacated and property released because public officers have not strictly followed provisions of the law, which are merely directory, and that assessments are not invalid if such directions are not complied with; that if the property owner omits to pursue the relief offered by the tax laws against the improper exercise of the taxing power, he cannot be relieved in equity, if at all, unless a strong case is presented; that in such case the property-owner must show that he has not been in default in availing himself of the means provided by the tax laws, and there must be something more than legal error assigned—facts must be presented appealing to the conscience of the court to prevent wrong and injustice; that if the objection as to the manner of making the return of the assessment is merely technical, and goes to matter of form and not to substance, a court of equity ought not to interfere; that as the tax laws require public notice of the meeting of the commissioners to correct errors, &c., in assessments the laws and publication impute notice to all persons whether they have actual information or not; and that as the tax laws authorize the commission-

ers to increase or abate valuations and to exclude property improperly valued, a court of equity has no jurisdiction to make corrections.

In that case the court affirmed the right of the authorities of Washington county to levy the tax upon the bridge belonging to the Virginia and Maryland Bridge Company, under an assessment which included the entire bridge of the complainant, except so much of the abutment on the Virginia shore as was beyond the limits of Maryland, as prescribed by the charter to Lord Baltimore.

Fifth. There is, however, one ground upon which we think this injunction must be sustained. The assessment unquestionably was designed to be upon the wooden bridge, and not upon the stone structure, or the canal. But this wooden bridge, as we have seen, consists, first, of that part within the town of Georgetown ; second, of that part between the shores of the river, and third, of that part of the causeway between the high-water mark on the Virginia shore and the level ground in Virginia. The language of the assessment is, "upon the wooden bridge," which word seems to describe an entire structure, and not a part of a bridge. Still if the matter stood on this alone, (upon the presumption that public officers are supposed to discharge their duties properly,) the conclusion might be that they only designed to assess so much of the wooden bridge as was within their jurisdiction ; that is to say, all of the structure north of the high-water mark on the Virginia shore.

But the complainants alleged in the bill that they were uncertain what was designed to be included in the assessment, and the more so, because the tax bill simply stated that the tax was levied upon "the bridge" at a valuation of \$75,000 ; and the commissioners were required "to show, state, and discover upon what property the said assessment was made ; whether it included or was intended to include the whole aqueduct, embracing the stone piers, the wooden and iron structure through which the canal passes, and used by boats and boatmen navigating the canal and the road bridge over the canal, with the approaches on the Virginia

shore as well as those on the District shore ; and, if the assessment was intended to cover only the road bridge, that they may discover whether the whole bridge across the river, embracing the approaches on the Virginia shore as well as the approaches on the District shore, were intended to be included, and were in fact included in said assessment ; and if the assessment was only intended to cover a part of the structure, less than the whole, that they may discover and answer what part was intended to be included, and was in fact included in said assessment and tax; and that they may discover, show, and answer how, in making said assessment, they made up the value of the property so assessed; whether the cost of constructing the road bridge was considered, or the present value of the structure on the part of it so assessed, or whether they estimated its value by the amount of its gross or net earnings."

The commissioners in their answer declare " that *the assessment* in said bill mentioned is upon *the wooden bridge* across the Potomac river, and constructed in part upon Beatty, Peter, Threlkeld, and Deakin's addition to the city of Georgetown, and that *only that portion of said bridge* which is within the limits of the District of Columbia was designed to be sold."

Where a bill is filed for a discovery, the general rule applies that the answer of the defendant, if responsive, is evidence in his favor, unless overcome by the testimony of two witnesses, or one witness with corroborating circumstances. *Turner vs. Knell*, 24 Md., 60. There can be no reason why admissions in such an answer in favor of the complainant should not have the force of testimony in his favor. It seems plain from the answer of the commissioners that they distinguish between the entire wooden bridge upon which the assessment was made, and that portion of the bridge which they design to sell. When they are stating what was *assessed*, they declare it was "*the wooden bridge*"—that is the *entire* bridge, but in describing what they intend to sell they aver it is only that portion of said bridge which was within the limits of the District.

They admit, therefore, that there is a portion of the bridge which has been assessed by them not liable to be sold, and this must be the portion lying in Virginia. The answer contains effectively a claim of the right of the commissioners to assess the entire bridge, though they only claim the right to sell that portion of it which is within their jurisdiction. If they have assessed the entire bridge, including that part which lies within the State of Virginia, the assessment is invalid. We cannot, in this proceeding, undertake to deduct for the overcharge by looking through the evidence to ascertain what the respective portions of the bridge originally cost. The franchise to use the bridge, as we have seen, may well enter into the assessment of its value, and we cannot apportion, if we had the right to attempt to do so, the share of the value of this franchise appurtenant to any particular portion of the structure.

This is not a case merely of excessive valuation, or of an omission upon the part of officials to comply with the directory provisions of the statute; but it is a claim advanced in this court by the District authorities to levy a tax upon the entire bridge, including that portion within Virginia, and we must, therefore, hold the assessment was illegal, and the collection of the tax should not be enforced. We are not to be understood as deciding that the granting of this injunction is to be considered as an acquittance of the tax properly due to the District. We are only deciding, that, for the reasons stated, no valid sale can be made under the assessment.

Sixth. It has been insisted upon the part of the District of Columbia that this court is inhibited from granting an injunction in the present case by Section 3224 of the Revised Statutes of the United States, which declares: "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." This section is placed under the article "Internal Revenue," and seems manifestly to apply to cases arising under the enforcement of that article. But the Supreme Court, in 2 Otto, 613, have declared that it was only intended to apply to taxes

levied by the United States. It can, therefore, have no application to the present taxes, which are levied by a municipality, although under authority of the United States laws.

It has been held in many cases by the courts that the mere illegality of a tax is no ground for the interposition of a court of equity, but that there must exist, in addition, special circumstances bringing the case under some recognized head of equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits or produce irreparable injury, or throw a cloud upon the complainant's title to real estate. *Dow vs. City of Chicago*, 11 Wall., 109. But we are of opinion that the general language used in the class of cases referred to applies to taxes levied by the sovereign alone.

In *High on Injunctions*, section 369, the author says: "It will be found on examination that courts of equity have been inclined in the cases of assessment of municipal corporations, to relax somewhat the stringency of the rule of non-interference as applied to the collections of State taxes. Thus a city assessment without authority of law will be enjoined, even where no question as to cloud upon title is raised."

And in *2 Otto*, 613, the *State Railway Cases*, the Supreme Court, after reiterating the general principle announced in *Dow vs. Chicago*, says: "Whether the same rigid rule shall be applied to taxes levied by counties, towns and cities, we need not here inquire; but there is both reason and authority for holding that the control of the court in the exercise of power over private property by these corporations is more necessary and is unaccompanied by many of the evils that belong to it when affecting the revenues of the State." And the above section from *High on Injunctions* is cited by the court to sustain this qualification of its former opinion. See also *Webster vs. Commissioners*, 51 Md.

For this reason we think equity has jurisdiction to grant the injunction in the present case, and the decree below is affirmed, but upon the single ground discussed in the fifth point.

BURCHE *vs.* WALLACH ET AL.

AND

WALLACH *vs.* BURCHE ET AL.

CONSOLIDATED.

EQUITY. No. 3571.

{ Decided July 6, 1881.

{ Justices WYLIE, MAC ARTHUR and HAGNER sitting.

Upon a sale of property by a trustee having power to fix, by previous advertisement, the terms and conditions of the sale, the rights of the parties are acquired and controlled by these terms which cannot be varied unless an independent contract has been entered into which would prevent a party to it from insisting upon them. Thus, where a piece of property had been sold for default in payment of a joint promissory note, secured thereon, and the holder of the note had entered into a private arrangement with one of the joint makers, different from the advertised terms under which the property was apparently sold, in consequence of which arrangement the latter became the purchaser of the property, the other maker of the note, having been no party to the arrangement, either by consent or subsequent ratification, cannot thereby be deprived of any benefit or interest which would otherwise accrue under the advertised terms of sale, although the agreement will be binding between the parties to it.

APPEAL from a decree of the Court in Special Term making distribution of the proceeds of a sale under a deed of trust.

THE CASE is stated in the opinion.

LUTHER H. PIKE and T. JESUP MILLER for appellants.

HINE & THOMAS for appellees.

Mr. Justice MAC ARTHUR delivered the opinion of the court.

Mrs. Burche and Mrs. Wallach are sisters, and acquire title to the property in controversy through the will of their father, who died many years ago, leaving a wife to whom he devised a life estate in the property. She also died in the fall of 1872, leaving these two ladies with an absolute title in fee simple. On the 15th day of January, 1872, these two sisters borrowed \$5,000 from Mrs. Rebecca R. Mellen, and they both joined in executing a promissory note to her for that amount, and a deed of trust upon the property to secure its payment. The note was payable in five years, with interest at the rate of 10 per cent. per annum, payable semi-annually, and the condition of the deed was that upon

default being made in the payment of the interest, or any part of the principal, the property might be sold by the trustee, who was J. C. G. Kennedy, upon an advertisement of ten days, and the whole amount of the indebtedness would then become due. Default having been made in the payment of interest, Mrs. Mellen directed the trustee to advertise the premises for sale. Mr. Kennedy thereupon advertised the property for sale, and, on the 8th of December, 1873, sold it at public auction, the same being struck off to Mrs. Burche, she being the highest bidder, for \$16,509.66. This would leave a large balance after satisfying the indebtedness and interest and the other liens then existing upon the property in the shape of taxes.

Some of the doctrines applicable to trust deeds have been so well established that they may be considered elementary. The trust deed is assimilated to a mortgage in many respects and the notice advertising the property for sale is analogous to a decree in foreclosure. The effect of a sale in either case and the execution of the deed to the purchaser, is to convey all the right, title, and interest of the grantors in the property to the purchaser, and to cut off their right of redemption forever. They are alike, also, in the consequences of such sale, that the proceeds are to be applied to the satisfaction of the indebtedness, and, if a balance remains, it is to be distributed to the grantors in the trust deed, according to their interest in the property. The equity of redemption existing in the owners is converted by such sale and represented by the balance of the purchase money, after satisfying the security, and the sale becomes a satisfaction of such debt to the amount of the proceeds realized. A distribution to the grantors only takes place in case of there being a surplus. Had there been a judicial foreclosure in this case—and it is much to be regretted now that that course was not pursued—the court would have applied the proceeds as I have already indicated to the full satisfaction of the beneficiary, and afterwards to the grantors in the deed, according to the amount of their respective shares in the balance.

This rule would apply, also, to a sale after advertisement without judicial process, unless a different course had been agreed upon by *all* the parties interested; and, should a sale take place for any other purpose than that which I have mentioned, the court would interfere, for the purpose of preventing any deviation from the contract, or from the advertised terms of sale. The trust deed in this case has the following clause, and I believe such a clause is found in all similar instruments. It provides:

“ Upon any and every such default or failure being made in the payment as aforesaid, the said party of the second part [the trustee Kennedy], his successor or successors, shall, at the request in writing of the said Rebecca R. Mellen, or the holder of the note aforesaid, proceed to sell and dispose of said premises as aforescribed, or so much thereof as the said party of the second part, or his successor or successors, may deem necessary, at public sale, to the highest bidder, upon such terms and conditions as he may deem most for the interest of all parties concerned in such sale, first giving at least ten days notice of the time, place, and terms of said sale by advertisement in some newspaper printed and published in the city of Washington.”

Again, that—

“ Out of the proceeds arising from such sale or sales, after paying the proper expenses thereof, and other expenses of this trust, including a commission on the gross amount of said sale or sales of three per centum as compensation to the said trustee, to pay in the first place whatever of said debt, interest, costs, and expenses may be due and unpaid at the time of such sale or sales. Secondly, to pay whatever of said debt, interest, costs and expenses may then remain unpaid, although the same may not then have become due and payable; and, lastly, the surplus, if any, to pay over to the said party of the first part, their heirs,” &c.

There is also a provision for the payment of taxes and authorizing the trustee to pay them, in such case making the payment a part of the indebtedness secured by the trust deed.

The advertisement upon which the premises were sold states the following terms:

“Terms of sale: \$5,000, with interest thereon at the rate of ten per cent. per annum from January 15, 1873, together with the expenses of sale in cash, and the balance at one and two years, for which the purchaser is to give his notes, bearing interest at the rate of eight per cent. per annum, *and secured by deed of trust on the property sold.* Conveyancing at the cost of purchaser. \$250 to be paid by the purchaser immediately after sale.”

The sale seems to have taken place in conformity with the advertisement; and certainly, so far as Mrs. Wallach is concerned, no other view of that sale can be entertained. The rights of Mrs. Burche and Mrs. Wallach were determined by the terms of that sale, unless they have made an independent contract which prevents them from insisting upon the rights thus acquired. It is claimed that a contract did exist between Mrs. Burche and Mrs. Mellen, by which Mrs. Burche was to bid in the property, Mrs. Mellen advancing upon a new loan a sufficient amount of money to pay off the taxes upon the property, the interest upon the note, and the expenses of the sale, and to extend the time of paying the original indebtedness, Mrs. Burche agreeing to execute a new note and trust deed as a first lien upon the property.

Undoubtedly a contract to this effect was entered into by Mrs. Burche and Mrs. Mellen. During the argument of the case, the court understood the claim to be made that Mrs. Wallach was either a party to such contract or that she consented to it and ratified it afterwards. This is a fact that can be determined only by the proofs in the case. I have examined the testimony, which is very voluminous, reading it all through with great care, some portions of it more than once, and I fail to find a single particle of proof that Mrs. Wallach was a party to that agreement, or that she ever consented to the same, or ever ratified it in any way; but, on the contrary, that constantly from the time of the sale she has insisted upon her right to her share in the balance of the purchase money or the deferred payments.

A proposition, it is quite true, was discussed between Mrs. Wallach and Mrs. Mellen, or rather the husband of the latter, of the same character. But that was an independent conversation, having no connection with the agreement with Mrs. Burche. Mrs. Wallach then declined to enter into such an agreement, unless Mrs. Mellen would advance sufficient, in addition to the taxes and expenses of the sale, to pay Mrs. Burche her share of the purchase money. This was not accepted, however, and afterwards it appears an arrangement was made with Mrs. Burche, who became the purchaser, and, upon receiving from the trustee a conveyance of the property, she executed a trust deed to Mrs. Hain, mother of Mrs. Mellen. The amount of this trust was \$8,200, and it was taken in Mrs. Hain's name, for the reason that Mrs. Mellen had not a sufficient amount of her own to make the loan. She therefore borrowed \$1,000 from her mother, and took the note and trust deed in her mother's name, for the purpose of saving the expenses attending a sale of the property, should it become necessary to foreclose for default of payment of the debt or interest thereby created. It appears, however, that Mrs. Mellen had repaid her mother, and is now the holder and the real beneficiary in the trust deed. It is evident that the agreement between the two ladies under which the property was sold cannot affect the rights or interests of Mrs. Wallach, who was no party to it; and under the principles of law already announced, she would be entitled to a moiety of the balance of the purchase money, after the extinguishment of the indebtedness and the satisfaction of the other liens upon the property. This moiety is apparently about \$4,400, or a little upwards. No arrangement made subsequently to the sale can affect this interest or deprive her of the benefit to which she was entitled, she never having entered into any arrangement different from the terms advertised, and under which the property was apparently sold. The contract, of course, was binding as between Mrs. Burche and Mrs. Mellen. It is quite true that a creditor may extend such terms and such indulgences as he can agree upon with his debtor; but it cannot be said

that such a contract can affect a person standing in the relation to this property that Mrs. Wallach does, without her consent.

We, therefore, come to the conclusion that Mrs. Wallach was entitled to her portion of the surplus and to have it secured as a first lien upon the property, as the payments of such surplus were deferred, and she was entitled to her moiety according to the terms of the advertisement which stated distinctly that such balance was to be at one and two years, for which the purchaser was to give his notes, bearing interest at the rate of eight per cent. per annum and secured by deed of trust on the property sold.

Subsequently to all this, the litigation between these parties became somewhat complicated. Mrs. Burche filed a bill in equity against Mrs. Wallach for an account of the rents and profits of this property after the death of her mother, for the reason that she had occupied the premises and was bound to account for the rents and taxes. In this bill she states her agreement with Mrs. Mellen, as I have already set it forth. She does not pretend that Mrs. Wallach was a party to that agreement, but admits that her apparent share in the balance is over \$4,400; and the only relief she asks in the bill is the account of the rents and profits as already stated. Mrs. Wallach filed a cross bill, and also an original bill, the object of the latter being to set aside the sale for various alleged irregularities. The relief was denied, and the sale was confirmed. She, therefore, stands upon that sale and her rights under it.

During this litigation the property was sold under an order of the court. There does not appear to have been any supplementary pleadings or formal application leading to this sale. It was, however, by the mutual consent of all the parties that it took place, and in the interest of the property itself, which, during litigation, was exposed to dilapidation and decay. The parties, therefore, concurred in the advisability of selling the property and bringing the proceeds into court, to be distributed to the parties entitled to them,

without prejudice to any of the pre-existing rights and equities.

From these considerations it follows that the decree below must be reversed, and a final decree entered in the cause, giving priority in the distribution to Mrs. Wallach, the basis of such a decree to be the decree of the court below of January 3, 1880, and schedules A, B, C, of the auditor's report of October 29, 1879. From those documents I think the counsel, without any further reference to the auditor, can intelligently state the amount to be awarded in this final decree.

JOHN P. CONNELL *vs.* GILBERT VANDERWERKEN.

AT LAW, No. 7372.

{ Decided Nov. 1, 1881.

{ The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

1. A receipt acknowledging the payment of money may be explained or contradicted by parol evidence.
2. The defendant relied upon the following receipt: "Received of Gilbert Vanderwerken, \$164.50, to balance in full for all account for hauling stone for use on the work of construction on the Baltimore & Potomac Railroad, for him and for the firm of Vanderwerken & Co.; and I do hereby release him and them from all obligations on account of the contract for such hauling. J. P. Connell. 26th July, 1872." Plaintiff offered to show by parol evidence that the receipt was not designed as an acquittance of the claim sued on, but that the same was expressly excepted by the parties at the time from its operation.
Held, admissible.

THE CASE is stated in the opinion.

HINE & THOMAS for plaintiffs.

BAINBRIDGE WEBB and A. L. MERRIMAN for defendant.

When the receipt embraces something more than an acknowledgment of a certain sum being paid and when the amount paid is not a matter of dispute, the papers must be construed as other contracts, and the terms thereof cannot be varied by parol proof. *Curtis vs. Wakefield*, 15 Pick., 437; *Wakefield vs. Stedman*, *Ib.*, 562; *Barsby vs. Hamilton*, *Ib.*, 40.

Mr. Justice HAGNER delivered the opinion of the court.

This suit was brought in August, 1873, to recover \$375

for hauling for the defendant 750 perches of bluestone at 50 cents per perch. A verdict in favor of the plaintiff was rendered by a jury in July, 1876. A new trial was afterwards granted, and the case was then referred to a special referee, who examined a number of witnesses on both sides and reported in favor of the plaintiff. On motion, judgment was rendered on this finding, and the case comes here upon exceptions to the report of the referee.

The defendant, in support of his plea, "not indebted," relies upon a receipt, executed since the performance of the work, in the following words:

"Received of Gilbert Vanderwerken, \$164.50, to balance in full for all account for hauling stone for use on the work of construction on the Baltimore and Potomac Railroad, for him and for the firm of Vanderwerken & Co., and I do hereby release him and them from all obligation on account of the contract for such hauling.

"26th July, 1872.

J. P. CONNELL."

Although the receipt is not a technical release under seal, its effect must be to defeat the claim of the plaintiff, unless its conclusiveness is interfered with by extraneous proof. The plaintiff introduced evidence to show that, notwithstanding the fullness of its language, it was not designed as an acquittance of the claim sued on, but that the same was expressly excepted by the parties at the time from the operation of the receipt.

It appears that Vanderwerken & Co., in July, 1870, agreed with McLaughlin, Reynolds & Co., contractors, to furnish the stone required for the tunnel, bridges, &c., on the line of the Baltimore & Potomac Railroad, within the city of Washington; and, in the same month, John P. Connell & Bro. contracted in writing with Vanderwerken & Co. to haul for a designated price the stone which Vanderwerken & Co. had thus agreed to furnish to the contractors for the railroad.

By the first-named contract Vanderwerken & Co. were to be paid for such stone only as it should be built into the

work and measured by the engineers; and Connell & Bro. were apprised of this agreement, and were to be paid for hauling such stone only as Vanderwerken & Co. were to receive pay for. Vanderwerken & Co. failed to comply with their contract, and the defendant, who was their bondsman, took their place in the contract. The firm of Connell & Bro. was also dissolved; and the plaintiff alone, as he insists, made a new contract with the defendant by which he was to receive pay at fifty cents a perch for all stone that might be hauled to the tunnel, whether the same was used by the engineers or not.

The plaintiff further testified before the referee that when he came to a settlement with the defendant, on the 26th of July, 1872, and after he had finished all the hauling, the defendant's agent prepared the receipt of that date, and presented it to him for his signature; that on examination he found, that although the defendant proposed to pay him the balance only that was due him for hauling the stone which had been actually used on the railroad, yet the receipt in terms was an acquittance for all hauling done, including the stone which had not been used by the engineers but remained on the ground near the line of the work; that he thereupon refused to sign the receipt and reminded the agent of the defendant that by his contract with the defendant he was to receive pay for all the stone he hauled, whether it was used or not; that the defendant's agent thereupon proposed to the plaintiff that if he would sell for the defendant all the unused stone along the line of the work, including the spalls or chippings from the stone, he might pay himself from the proceeds for hauling the unused stone at the rate of seventy-five cents a perch, and, after deducting his pay at that rate, pay over the balance to the defendant; that the plaintiff agreed to this proposition, and signed the receipt upon the understanding that he was in this way to be paid for hauling the unused stone, which he testified amounted to 750 perches. He further testified that when he attempted to make sale of the unused stone and spalls under this agreement, he found that the same had already been sold to

another person, and that he would be unable to realize his claim from that source.

The first question is, whether this testimony was proper to be considered by the referee to explain or defeat the force of the receipt.

The principle invoked by the plaintiff in support of its admissibility is well established.

“It is a familiar principle that receipts acknowledging the payment of money may be explained or contradicted. This constitutes an exception to the general rule giving a conclusive effect to written evidence; and it has been properly said that the exception was introduced for the general security and convenience to protect mankind from fraud.” 1 Greenleaf on Evidence, sec. 305.

Thus it has been held admissible to show that the receipt was produced by false representation; as in the case of *Michaels vs. Post*, 21 Wallace, 398, where a creditor was induced to execute an acquittance in full of his claim by false representations of another creditor, who thereby obtained an unjust preference. Or to show that a receipt absolutely admitting the payment of a sum of money was executed upon an agreement that something should be received in lieu of the money consideration expressed in the receipt; as in *Shepherd vs. Bevin*, 9 Gill, 36, where the distributee of an estate executed an acquittance in full of his share in the personal estate of his father, he was permitted to show that no money passed, but that it was agreed that a credit should be given to him contemporaneously upon the purchase of an interest in land. So in *Cramer vs. Shriner*, 18 Md., 144, where it was held that it was competent for the plaintiff to prove by parol that a written receipt, which in terms was for “all store, saddler’s bill to date, and all wheat delivered at Linganore and Ceresville Mills to date” was a settlement of all accounts, between the parties, *except as to a quantity of grain*, which it was agreed at the time was not to be comprehended by the terms of the receipt.

Upon the principle of these cases, we are of opinion that the evidence offered was admissible to explain the receipt.

Its object was to show that when the plaintiff acknowledged full satisfaction of all claims against the defendant, he only designed to admit that this satisfaction consisted as well of the payment of the \$164.00 as of the agreement to transfer to him the control of the stone which he was authorized to sell, and out of which he was to pay himself the balance due him.

The only question remaining, then, is as to the effect of the evidence thus offered. In our opinion it sustains the contention of the plaintiff. Apart from the plaintiff's own positive oath to this effect, we have the fact that a quantity of stone was hauled by him for the defendant for which he has never been paid; and, when this account was presented to the defendant, and also to his son, who was his general agent, neither of them denied the performance of the work, nor gave any other satisfactory reason for not making the payment. The quantity of hauling thus remaining undischarged is positively vouched for by the plaintiff, and he is effectively supported in his estimate of the balance due by two witnesses, and by the circumstance that neither the defendant nor his agent questioned the correctness of the charge in that respect.

A careful examination of the testimony has failed to show us any reason why the judgment should be disturbed, and we are of the opinion that it should be affirmed.

JOHN W. EBBINGHAUS, *Trustee*,

vs.

JOHN GEORGE KILLIAN ET AL.

IN EQUITY. No. 5,688.

{ Decided Nov. 21, 1881.

} The CHIEF JUSTICE and Associate Justices WYLLIE and HAGNER sitting.

1. A bill in the nature of a bill of interpleader is not within the rule applicable to bills of interpleader strictly so called, viz., that they can only be maintained where the plaintiff claims no interest in the subject matter, for in many cases the former will lie by a party in interest to ascertain and establish his own rights where there are other complicating rights between third parties.
2. Courts of chancery have supervision and control of all unincorporated societies or associations. With respect to them they have the power of prevention of acts contrary to law and prejudicial to the interests of the community, or to the rights of individuals, and can afford specific relief where a recovery in damages would be an inadequate remedy for the wrong.
3. So, where by reason of the numbers of the parties and the character of their rights, damages are unsuitable as a means of redress, equity will apply the required remedy.
4. In a controversy over a trust claimed to have been created for religious purposes, chancery, which exercised jurisdiction in such cases on the ground of trust, must give effect to its provisions, if they be legal, and to that end must ascertain and determine its scope and object. In that investigation the court is authorized to resort to the early history of the church as contained in standard and authentic works on the subject prior in date to the existence of the particular controversy.
5. Before a title to land by possession alone can be successfully maintained, the possession must be shown to cover the full period of twenty-one years, and that during all this time it has been actual, adverse, visible, notorious, exclusive and unbroken with claim of title against all the world.
6. The statute of limitations has no application to express subsisting trusts. In such cases the trustee, while he holds possession, holds in behalf of the real *cestui qui trusts*, whoever they may be. He cannot, therefore, invoke adverse possession in favor of persons claiming as beneficiaries if, under the trust originally impressed upon the property, they are not in fact the true beneficiaries.
7. Where the possession of a party is under and in privity with the estate of the person under whom such party claims, there can be no adverse possession against that person.
8. Where a trust has been created for the benefit of a particular class of persons, as for example, "for the Calvinist Society," and there is nothing in the deed expressly declaring the particular nationality or location of the society to whom the advantages of the trust are to enure, the court will be governed by the circumstances surrounding the trust at its inception, and if there is sufficiently evinced an intention by the grantor to confine it to particular persons of a particular locality, the court will give effect to that intention and restrict the trust to those persons and to that locality most probably intended to be benefitted.
9. In 1770 a trust for the benefit of an unincorporated religious body was created in lands situated in what now constitutes the District of

Columbia. Subsequently, under the act of Maryland of 1791, ch. 45, making provision for the allotment and assignment of certain lots of ground to certain parties, "to hold the same in their former estate," two lots were conveyed to the trustee in lieu of the original trust property held by him.

Held, That the conveyance made under the authority of this act was to be taken as a full legislative assent to the validity of the title of the trustee.

10. The statutes of mortmain (in force in Maryland, 1770.) applied only to corporations. Trusts made by feoffment grant or devise to unincorporated bodies for charitable uses and purposes, not deemed superstitious, were not invalid, and a trust for a religious purpose has long been declared a charitable purpose in this respect.

11. After a lapse of nearly a hundred years, during which time the validity of a trust had never been questioned, and all parties ever claiming the property had claimed under the trustee's title, the court will, under proper circumstances of possession, presume the existence of grants and the enactment of statutes necessary to confirm the trustee's title.

THE CASE is stated in the opinion.

F. P. CUPPY for the First Reformed Church.

H. W. GARNETT for Concordia Church.

Mr. Justice HAGNER delivered the opinion of the court.

The bill in this case, filed by John W. Ebbinghaus, charges that he is trustee in equity under the appointment of the Supreme Court of the District of Columbia, and, as such, is seized of lot No. 9 in square 80, in the city of Washington, and holds the same as successor to a certain D. Reintzel, deceased, for the "German Calvinist Society," in accordance with the intent of a certain Jacob Funk, the original owner of the property, in trust for the use and benefit of the legal successors and beneficiaries of the said "Calvinist Society," whoever they may be; that he is ready to pay the rents, issues and profits thereof when received by him into court, to be disposed of as it shall direct, and to perform all the duties of his office according to law; and that he institutes this suit with the view and purpose of procuring the settlement and determination, by the court, as to who are the legal beneficiaries under said trust. He further charges that certain John G. Killian and others, asserting themselves to be the trustees of the German Evangelical Concordia Church, at the corner of 20th and G streets, N. W., in Washington city, claim to be the legal beneficiaries of the said trust for religious purposes, and, as such, entitled to the rents, issues

and profits of the said lot No. 9; that said trustees have, from time to time, received large sums of money arising from such rents, issues and profits, without the consent of the said Reintzel, or of the complainant as his successor, as trustee; and he charges they ought to account to the complainant, as trustee, for these rents, issues and profits, and in the meantime pay them into court to abide the determination of the suit.

He further charges that a certain August Seivers, and others, claiming to be trustees of the First Reformed Church of the city of Washington, D. C., also claim to be the legal successors of the "Calvinist Society," and, as such, to be the legal beneficiaries of the said trust, and entitled to receive the rents, issues and profits, and the estate therein; and that the said Seivers and his co-trustees are expected to sue the complainant for the recovery of their supposed rights. He prays that an account may be taken of the rents so received by Killian and his co-trustees in behalf of the "German Evangelical Concordia Church;" that said trustees may be decreed to pay into the court whatever may be found due on account of said rents; that they and the said Seivers and his co-trustees, and all other persons, may be enjoined from bringing suit against the complainant in respect of the said property, or interfering further with the same, until the decision of the court shall be known in the premises; and that the respective claimants so asserting themselves to be the beneficiaries of the trust may be required to interplead together in this suit; that all necessary accounts may be taken, and for further relief. Killian and his associates, as the trustees of the "German Evangelical Concordia Church," in their answer, deny the title of the complainant as trustee, and claim the property in behalf of the church of which they are trustees. They deny their accountability for the rents and profits, except to the said Concordia Church, and insist that the right and title of the property is in them; and aver that possession of the same has been in the church of which they are trustees for over thirty years.

Seivers and others, as trustees of the First Reformed

Church of the city of Washington, answer the bill, admitting in general its allegations; insisting that their church is the legitimate successor of the Calvinist Society, and claiming that they are the rightful beneficiaries under the trust set forth in the bill.

A large amount of testimony was taken on behalf of the respective claimants, and the case has been argued with ability and care.

It appears from the proof that about the year 1882 a large number of Germans found themselves domiciled in the city of Washington, which then contained no church where the services were performed in their own tongue. The bond of nationality proved stronger than devotion to religious forms, and they all, from time to time, assembled in common worship conducted in the German language by some of their members; and the testimony discloses the rather remarkable fact that this company of foreigners, composed of Jews, Roman Catholics, Lutherans and Calvinists, for a considerable time continued in harmony to attend the same religious exercises.

About the close of the year, at one of these religious meetings, it was mentioned by some one present, that he understood there were two lots of ground in the western part of the city, which had been set apart by a certain Jacob Funk for the benefit of German religionists. It was thereupon decided that inquiry should be made to ascertain the facts. The result of the investigation disclosed that on the assessment books of the city there stood in the name of "D. Reintzel, for Lutheran Congregation," a lot at the corner of Twentieth and G streets, and in the name of "Reintzel, for Calvinist Society," a lot at the corner of Twenty-second and G streets.

It appears from the records of the District, in proof and from recitals in the statutes of Maryland and of the United States, that, as far back as 1770, a certain Jacob Funk became the proprietor of a parcel of land in Prince George's county, Maryland, reaching in a northeasterly direction from the neighborhood of what is now known as Easby's wharf on the Potomac river, in Washington city, towards

Pennsylvania avenue; that in that year he caused a plat of a town to be made, which was entitled "the plan of Hamburg," upon which he divided his property into streets, squares and lots; and that he executed conveyances of many of these lots, which were recorded in the office of the county court of Prince George's county.

In 1791 the legislature of Maryland passed a law, chapter 45, reciting that the President, by virtue of several acts of Congress and of the assemblies of Virginia and Maryland, by his proclamation in March, 1790, had declared that the ten miles square for the permanent seat of Government for the United States should be included within designated lines upon both sides of the Potomac; that Notley Young, and Daniel Carroll, of Duddington, and many others, proprietors of a greater part of the land so laid out in the city, had conveyed their lands to trustees, agreeing to give up part to the United States, and subjecting another part to be sold to raise money as a donation to be employed in establishing the seat of Government; and that many of the proprietors of lots in Hamburg had agreed to subject their lots to be laid out anew, giving up one-half to be sold and they to be reinstated in one-half of the quantity in a new location, &c., in the city, but that some of the proprietors of Hamburg, from imbecility or other causes, had failed to come into such agreement, and it appearing to the general assembly just and expedient that all the lands within the city should contribute in due proportion in the means which had already greatly enhanced the value of the whole, and that an incontrovertible title should be made to the purchasers under public sanction it was enacted that in all cases where persons holding lots in Hamburg had failed to make such conveyance to the trustees public notice should be given and an allotment thereafter made, assigning to each holder of lots in Hamburg a lot on the plat of the city equal to one-half in quantity of their original holding; and that all persons to whom allotments and assignments of lands should be made by the commissioners according to this law should "hold the same in their former estate," in lieu of their former possessions.

It is further shown that a report was made by the commissioners appointed under this law, specifying the parcels of land which had been allotted by them to the former owners of lots in Hamburg, in lieu of their original lots; and that in accordance with the statute the commissioners conveyed said substituted lots to such persons; and that among the lots received under such circumstances was lot No. 9, in square 80, the vacant lot in controversy, which was conveyed to "D. Reintzel for Calvinist Society," by a deed of conveyance of the 28th of June, 1793, in lieu of lot No. 75 standing in the same name on Funk's plat; and on the same day lot No. 5 in square 121 was conveyed to "D. Reintzel for Lutheran Congregation" in lieu of lot No. 183 on Funk's plat.

It does not appear, and it is not probable, that the inquiry as to the lots which was set on foot by the Germans, resulted in the ascertainment of any of the foregoing particulars as to the title, or disclosed anything further than the entries in the assessment books. But shortly afterwards they took possession of the lot at the corner of 20th and G streets, and by the joint efforts of all the Protestant Germans, a church was erected for their common use; the Jews and Roman Catholics having previously withdrawn and allied themselves with congregations of their own faith.

The purpose of those aiding in the erection of the church seems rather to have been the establishment of a place where they might listen to Protestant religious teaching in their own language, than the inculcation of any of the peculiar tenets of the different Protestant churches. The evidence shows that Lutherans and Calvinists contributed alike towards the building; and that after its completion the Holy Communion, from time to time, was administered within its walls, alternately, according to the respective usages of those denominations. The inscription over the principal door of the edifice, "Concordia Church," seems to have been conceived in sympathy with this sentiment and purpose.

For many years thereafter the lot at the corner of Twenty-second and G streets, the subject of the present controversy,

remained unoccupied. No taxes were assessed against it by the municipality, showing that it was recognized as church property. Finally it was taken possession of by the persons claiming to act as trustees of the Concordia Church, and it has since been leased and rented to different individuals, by the trustees of that church, who received the rents, as they accrued, and who are still in its possession.

After the joint occupancy at the church building had continued for a considerable time, an attempt was made by the pastor then in charge to introduce and inculcate the distinctive forms and doctrines of the Lutheran Communion; and this led to the withdrawal of a considerable number of the Calvinists, and the establishment by them of the First Reformed Church.

Many of the pronounced Lutherans had also withdrawn and joined themselves to the Lutheran churches which had been erected in the city. But there still remained, as attendants of the Concordia Church, some of its original promoters, who formed the nucleus of the present congregation, which claims the vacant lot as belonging justly to the Concordia Church to the exclusion of all others.

1st. The trustees of the Concordia Church first object to the form of the present proceeding. They rely upon the principle of equity pleading, that it is essential to the maintenance of a bill of interpleader that the plaintiff should occupy a position of entire impartiality between the different claimants, and be in no way interested in the result of the litigation, since otherwise he might, indirectly, influence the decision; and they insist that the complainant in this case is disqualified to maintain this suit since he is shown by the proof to be the minister of the First Reformed Church, one of the defendants.

But, in our opinion, this fact does not necessarily commit him, in his capacity as trustee, to the interests of the Reformed Church.

The object of the proceeding is to determine, and thereby to instruct him, in whose behalf he shall continue to hold the property; and, as trustee, he is equally interested and bound

to uphold the rights of the one set of claimants, or the other, according as the question may be decided by the court.

The complainant expressly disclaims all interest in the result, and annexes to the bill the usual formal affidavit required by chancery practice in such cases—that he does not collude with either claimant to the trust property, but brings the suit for the sole purpose of procuring from the court a determination of the question as to which of the rival trustees are the legal beneficiaries of the trust.

Under his appointment as trustee by the court, he holds the property as Reintzel held it. If Reintzel would now be adjudged to stand as trustee for the benefit of the Concordia trustees, so must the claimant ; if for the benefit of the Reformed Church, the complainant equally must be held to be trustee for that organization ; and if it should be decided that neither of these distinctive organizations is entitled, but that the property belongs to some other association more properly representing the “ Calvinist Society,” then, as trustee, he is bound to maintain the rights of that association against both the others, or be removed from his trust.

The general principle asserted in behalf of the Concordia Church is undoubted. But there are bills not strictly of interpleader, which are known as “ bills in the nature of bills of interpleader ;” and we regard the present as of this character.

It is laid down in works of authority, that, although a bill of interpleader strictly so called lies only where the party applying claims no interest in the subject-matter, yet there are many cases where a bill in the nature of a bill of interpleader will lie by a party in interest to ascertain and establish his own rights, where there are other complicating rights between third parties. “ For instance, if a plaintiff is entitled to equitable relief against the owner of property, and the legal title thereto is in dispute between two or more persons, so that he cannot ascertain to whom it belongs actually, he may file a bill against the several claimants in the nature of a bill of interpleader for relief. In these cases the plaintiff seeks for relief for himself, whereas in an interplead-

ing bill strictly so called, the plaintiff only asks that he may be at liberty to pay the money or deliver the property to the party to whom of right it belongs." Story's Eq. Pl., §279,*b*.

To the same effect it is stated in Story's Equity Jurisprudence, §817, *a* and *b*, that an agent of one of two parties can be complainant in a bill in the nature of a bill of interpleader where the other party claims under his principal. And so it has been held that a public agent may interplead independent claimants.

We consider that this bill is maintainable upon well-settled principles of equity jurisdiction.

Courts of chancery have supervision and control of all unincorporated societies or associations. With respect to them they have the power of prevention of acts contrary to law and prejudicial to the interests of the community or to the rights of individuals, and can afford specific relief where a recovery in damages would be an inadequate remedy for the wrong. 62 Penn. St., 428 Kisor's Appeal.

Where, by reason of the numbers of the parties and the character of their rights, damages are unsuitable as a means of redress, it is settled that equity will apply the required remedy. As in 30th Maryland, 38, Gilbert *vs.* Arnold, where the trustees of a Methodist church applied for an injunction to restrain interference with the property by rival claimants, the court declared that, conceding the complainants had a full and adequate remedy at law for the acts of intrusion, yet, taking into consideration the number of the beneficiaries entitled under the trusts, the vexatious litigation and recurring multiplicity of suits which would necessarily arise if the settlement of these questions were to be remitted to the law, it was proper that equity should assume jurisdiction and grant relief. The same doctrine is announced in the well-known case in 2d Peters, 585, Beatty *vs.* Kurtz.

The *jurisdiction* of chancery is exercised in this class of cases upon the ground of a trust. It is the duty of these tribunals to give effect to the powers of the trust if they be legal, and to that end they must ascertain and determine its

scope and object ; in that investigation they are authorized to resort to the early history of the church, as contained in standard and authentic works on the subject, prior in date to the existence of the particular controversy.

2d. Believing, then, that the complainant has full right to maintain this suit, the next question is, for which of these contesting parties, if either, should this property be held by the trustee ?

We have seen that this property stood on the assessment book in the name of " D. Reintzel for Calvinist Society." The Calvinist Society thus described, or its legal successor, must of course be the properly entitled claimants, if the trust is a valid one.

Have the defendants, Killian and his co-trustees of the German Evangelical Concordia Church shown themselves entitled as the beneficiaries of the trust ?

It appears that since the institution of this suit, these trustees for the first time have applied to become incorporated under the general law of the District by the name of "The German Lutheran Evangelical Concordia Church," although they insisted, when the proof was taken, that a considerable proportion of their members held the Calvinist doctrines.

It seems to us clear that the Concordia trustees have failed to show that they are the successors in doctrine of the Calvinist Society. It is part of the general history of the world that after the Protestant Reformation had been set on foot by Luther, the first authoritative declaration of the principles of the great reformer was presented to Charles V, June 25, 1530, at the city of Augsburg, in certain articles of faith embodied in what is known as the Augsburg Confession ; and this confession, revised by Melancthon, under the supervision of Luther, has ever since, it is believed, constituted the accepted creed of the Lutheran Church. Soon that came to pass among the reformers, which characterizes the progress of all reformations. Those who have taken the initiative in such great enterprises soon find themselves left behind by the more enthusiastic and enterprising of their

former followers. The more ardent of the reformers soon declared that the reformation was incomplete ; that it was not as thorough as it should have been, and they especially censured the retention by the Lutherans of the practice of auricular confession, and their supposed doctrine as to the presence in the sacrament under the name of consubstantiation. These reformers of the Reformation, under the lead of Calvin, formulated their amended creed in what is known as the "Heidelberg Catechism," which disputed the doctrine of consubstantiation, insisted that the sacrament in both kinds should be given to the laity, discarded the use of the Hostie or consecrated wafer, and denounced in all its forms the practice of auricular confession to priests.

Now it appears distinctly in the proof that the books of doctrine in use in the Concordia Church, during all this time, have been those of the Augsburg Confession; and that wherever there has been a distinct attempt to define the doctrines of those worshiping there, it has disclosed an adherence to the Lutheran, rather than the Calvinist, tenets of belief and practice. The predominance of this distinctive tendency is further evinced by the circumstance already alluded to, that since the institution of this suit their trustees have elected to be incorporated under the name of "The German *Lutheran* Evangelical Concordia Church."

Indeed, the claim that the Concordia Church holds the religious doctrines maintained by the Calvinist Society about the close of the last century, is so much at variance with the proof that the Concordia trustees have chiefly rested their claim of title upon possession—which, according to their answer, has continued in them for thirty years. It is well settled that before parties can successfully maintain a title to land by possession alone, they must show that this possession covers the full period of twenty-one years; and that during all this time it has been actual, adverse, visible, notorious, exclusive and unbroken, with claim of title against all the world. *Thistle vs. Frostburg & Co.*, 10 Md., 148; *Baker vs. Glessee*, 32 Md., 355.

But the proof establishes no such form or duration of pos-

session by these claimants. Without the further comment upon the evidence, it is enough to advert to the fact, that less than twenty years since, by a resolution of the trustees of the Concordia Church, it was declared that unless the Calvinists within ten years from that date should erect a church on the lot in question it should be *thereafter* claimed absolutely by the Concordia Church; and as late as 1867 the members of the Calvinist communion of the city of Washington, publicly claiming title thereto, took measures to build on the lot a church for their own people, although they afterwards saw fit to change this purpose.

But even if possession uninterruptedly for twenty-one years had been shown in the trustees of the Concordia Church, such possession could only have been in behalf of the beneficiaries of the trust originally held by Reintzel, whoever they may be; and the Concordia trustees cannot invoke this length of possession against these beneficiaries. While they held possession it was in behalf of the real *cestui qui trusts*, under the trust impressed upon the property in the hands of Reintzel, and the statute of limitations, if openly pleaded, has no application to express subsisting trusts. Because of the privity existing between them, the holding by a trustee is the possession of his *cestui qui trust*, and wherever a trustee seeks to claim against his trust and thus destroy it, the courts hold that his tenure shall be reckoned according to his title as trustee. (Lieman's Estate; 32 Maryland, 239.) And if it were true, as alleged by the Concordia Church, that a part of those composing their congregation has always consisted of Calvinists, the possession by the trustees was equally a possession for the Calvinists. Where the possession of a party is under and in privity with the estate of the person under whom such party claims, there could be no adverse possession against that person. *Nutwell vs. Tongue*, 22 Md., 419.

This length of possession is not presented by a plea of the statute against the right of recovery by the Reformed Church, but is relied on by the Concordia trustees as a circumstance from which a presumption may arise of the execu-

tion to them of a grant of the land. But this presumption can never arise in the absence of such possession as the law requires as a preliminary condition. It is clear then that we cannot decree in favor of the trustees of the Concordia Church.

3d. Has the First Reformed Church of the city of Washington shown such title as will enable this court to decree in its favor?

It is not the same in name with the Calvinist Society. The believers in the doctrine of Calvin have been less tenacious of retaining the name of their great leader than the Lutherans, for there are numerous denominations of Christians who have adopted the distinguishing doctrines of Calvin, under widely different names. But it is insisted on behalf of the members of the Reformed Church, that they are the only proper successors of the religionists comprehended under the distinctive name of the "Calvinist Society."

Have they maintained this contention?

We have been much impressed by the evidence of Mr. Russell, a clergyman of the Reformed Church, which is given at large in the record.

It appears from the very intelligent narrative of this witness, who is a minister of the Reformed Church, that the peculiar doctrines represented originally by the "Calvinist Society" of the last century, and embodied in the Heidelberg confession, have been held under different names by the Reformed Church in this country for more than a century.

Those names have been affected by various circumstances, as the nationality of the members and the location of the churches. Among these designations were "High Dutch," "German Presbyterians," and "Sacramentarians." So, under the general denomination "Calvinists," was included the term "German Calvinists;" and the witness concludes his examination of the subject by the declaration of his belief that the Reformed Church of the United States is the only historical successor of the church intended by the name of

the "Calvinist Society." We have also been referred, as part of the public history bearing upon the controversy, to the book of the Rev. Michael Slatter, a distinguished divine of the Reformed Church, who was sent to this country about 1740 by the Calvinists, or Reformers, of Holland, to visit their brethren in faith who had settled in different parts of the then colonial governments. Slatter reports that he found numbers of his co-religionists settled in various parts of Pennsylvania, in the upper counties of Maryland, and in the valley of Virginia, and he visited some of them in the neighborhood of the Potomac. It is also part of the public history of the country that Calvinists, under the name of the Reformed Church, penetrated as far south as North Carolina; and that one-third of the convention that adopted the famous Mecklenburg Declaration of Independence which preceded the great Declaration by more than a year, and is thought by many to have been its prototype, and comprehending the president and other prominent members, were co-religionists of Slatter, who had brought to this country the same love of independence and liberty in civil government which they had claimed in matters of religious belief.

The Statutes at Large of Maryland contain acts of incorporation by its legislature at a very early day of congregations of the Reformed Church; and one of these Reformed Churches under the name of the German or High Dutch Christian Reformed Church had been established in that State in the neighborhood of Frederick many years before 1784, was engaged in a mandamus suit about the year 1794, to determine the right of occupancy of its pulpit. This contest is fully reported in the case of *Runkel vs. Winemiller et al.*, 3 Harris & McHenry, 429.

A distinctive feature in the belief of the religionists known as the Reformed Church represented under these different denominational titles, is their adhesion to the tenets of the Heidelberg Confession, unembarrassed by other distinguishing points of doctrine which are held by the Baptists and other religious bodies having a Calvinistic origin. And if we are to be guided by the evidence, we are compelled to

believe that the dogmas of that confession constitute the creed of the Reformed Church, essentially as they were maintained by the "Calvinist Society" during the last century, and ever since their first promulgation by the Calvinist branch of the Reformers.

4th. But there is nothing in the record *expressly* declaring that the benefits of the trust, which we have found devolve upon the Reformed Church, should enure to a church of that communion of any particular nationality or location; and the next inquiry is, whether we are justified in declaring that its advantages can be confined to the First Reformed which is represented by August Steivers and his co-trustees, who are Germans, and is located in the city of Washington, to the exclusion of their co-religionists elsewhere?

In the absence of such express declaration in the trust itself, we must be governed by the circumstances surrounding the trust at its inception. And in adopting this aid to a correct conclusion we are supported by the authority of adjudged cases.

In *Gibson vs. Armstrong*, 7 B. Monroe, 487, where a deed executed in Maysville, conveyed property for the benefit of the "trustees of Methodist Episcopal Church of America," the court held that they were justified by the facts of the case in deciding that the benefit of the trust should secure to the Methodist Episcopal Church in Maysville.

In the case of *Beatty vs. Kintz*, 2d Peters, 585, there had been a dedication by a proprietor of a lot in Georgetown to "the Lutheran Church;" without the addition of words to confine its benefits to any local organization of that church. But the facts sufficiently evinced the intention of the donor to restrict the benefits of the property to his neighbors, rather than have it frittered away uselessly by subdivision among the Lutheran Church at large; and the Supreme Court properly held that the German Lutheran Church of Georgetown was exclusively entitled to its enjoyment.

By a similar consideration of the circumstances disclosed in the present case, we are led to the conclusion that the successors in doctrine of the Calvinist Society, of German

lineage, and worshiping in Washington city, should be held to be the exclusive beneficiaries of the trust. Certainly the Dutch and German names, "Funk," "Reintzel," and "Hamburg," would seem to indicate the affiliations of the originators of the trust and the nationality, most probably designed to be benefitted; and the position of the lots, their unimportance to the church in general and their adaptation to use by a local congregation, would repel the idea that men of ordinary sense would think it worth while to make the church in general, the beneficiary of what to it would prove the merest trifle. Accordingly we recognize in the trustees of the First German Reformed Church of Washington city the lawful successors of the "Calvinist Society," mentioned in the deed of trust, and entitled to the beneficial interest in the lot in controversy, and to its rents, issues and profits.

5th. Other considerations have presented themselves in the progress of this examination, and among others, "whether there is any invalidity in the trust in favor of an unincorporated religious body without the assent of the legislature of Maryland. The Statute of Charitable Uses, 43d of Elizabeth, ch. 4, never was in force within that State; and the constitution of 1776 invalidated any gift, sale or decree of land to any minister of the gospel, or to any religious sect, without the leave of the legislature, except the sale, gift or decree of not exceeding two acres of land for a church and burying ground, which was to be improved, enjoyed or used only for such purpose.

There is nothing in the record to prove that the original Hamburg lot was the *gift* or *devise* of Jacob Funk. He sold and conveyed a large number of the lots described on his plat, and the only support of the idea of a donation of the church lot was the statement made at the meeting of the Germans in 1832. But whatever he did was accomplished in 1770, before the adoption of the Maryland constitution, which was more restrictive than the English statutes of mortmain in force in the province. That which was conveyed to Reintzel in June, 1793, was to be held by him "as of his former estate in lieu of the former lot," and the titles

though acquired in 1793, to the particular lot, related back to the acquisition of the property for which it was substituted before 1770.

That chancery had jurisdiction of devises and conveyances for charitable purposes before the 48d of Elizabeth, may be said to be settled elsewhere than in the State of Maryland, where the contrary is held in *Dashiell vs. Atty. Genl.*, 5 G. & J.

But it is decided that the acts of mortmain applied only to corporations exclusively, and that trusts made by feoffment, grant or devise to unincorporated bodies for charitable uses and purposes, not deemed superstitious, were not invalid. *Wright vs. Trustees*, 1 Hoff Ch., 248. And a religious purpose is a charitable purpose, in this respect, as declared by Lord Langdell in 1 Keen, 233.

Again, the Maryland act of 1791, under which the title to lot No. 9 was for the first time vested in Reintzell, in lieu of his former possession in the Hamburg tract, must, by every fair intendment be taken as a full legislative assent that the beneficiaries of the trust should have an effective and valid title to enjoy the property then deeded to their trustee, as a religious society, as their name proclaimed them to be. To conclude otherwise would be to impute to the legislature unfair dealing in transferring their original Hamburg property to others by "incontrovertible title," while reserving the power to invalidate the new title communicated under their own statute.

From the date of the deed to Reintzel to this time no claim has been presented by any one attacking Reintzel's title, and all who have claimed the property have claimed through him. Nearly one hundred years have passed without the pretence of an adverse right against the validity of the trust.

After such an interval, under proper circumstances of possession, the courts would instruct a jury to presume the existence of grants and the enactment of statutes to confirm ancient titles; and it appears to us that, in this case especially, that doctrine of repose might well be invoked to settle a

title claimed in the interest of good order and of the principles of morality and religion.

We, therefore, see nothing to invalidate the title of Reintzel by reason of the inhibition in the Maryland constitution of 1776, or in the antecedent law against the holding of property for the benefit of unincorporated religious societies, or upon any other ground.

And having arrived at the conclusion, as before announced, that the trustees of the First Reformed Church of Washington, D. C., are to be regarded as the successors in faith of the Calvinist Society, we think the complainant should be decreed to hold the property for the benefit of that church. It follows from this that the possession of the property by the defendants, the trustees of the Concordia Church, has been without legal authority, although we have no intention of questioning that this possession was the result of an honest belief of their right to do so.

It follows that their receipt of the rents and profits during this period was without authority, and that they ought to account to the complainant trustee for these rents and profits. But in view of the peculiar circumstances of the case, we have determined that these rents should not be claimed beyond the time of the filing of this bill.

It also appears that the Concordia Church has paid taxes during this time; and if the taxes paid by them should exceed in amount the rents received up to the filing of the bill, the Concordia Church should be credited with the difference.

We shall pass a decree, in accordance with the principles of this opinion, enjoining the Concordia Church from interfering further with the possession of the lot; directing the trustee, Ebbinghaus, to hold the property for the benefit of the First Reformed Church, and to account to them for the rents, issues and profits of said property, and requiring an account to be taken by the auditor of the amount of rents so received by the Concordia Church, and of their payments on account of the taxes.

SAMUEL STRONG vs. THE DISTRICT OF COLUMBIA.

AT LAW. No. 14,736.

{ Decided Nov. 21, 1881.

{ The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

1. The reiterated decisions of the Supreme Court of the United States and of this court have sufficiently warned counsel of the consequences of neglecting divers requirements in the preparation of cases on appeal; this court, therefore, will not consider exceptions which would inevitably be held fatally defective in this respect on appeal to the Supreme Court of the United States.
2. A contract entered into with the Board of Public Works in respect to street improvements is to be treated as a contract with the District Government. (*Following Barnes' Case*, 91 U. S., 540.)
3. The provisions of the act of Congress, February 21, 1871, which denied to the Board of Public Works all power of making contracts to bind the District, except in pursuance of appropriations made by law and not until such appropriations shall have been made, and declaring that all such unauthorized contracts or agreements shall be null and void, and forbidding the Legislative Assembly to authorize the payment of any claim against the District "upon any contract or agreement made without express authority of law," were within the limits of Congressional legislation.
4. Consequently a contract for street improvement entered into with the Board of Public Works at a time when there was no antecedent appropriation for that work or for the materials furnished under such contract, is null and void, and inadmissible in evidence for the purpose of recovery upon it notwithstanding the work may have been performed and the materials furnished in conformity with its terms.
5. A *quantum meruit* cannot be sustained for the recovery of money claimed to be due for work done under a void contract, payment of which is forbidden by law.
6. The law imputes to parties full knowledge of the public statutes, and they are not to be heard to plead ignorance on the subject.
7. An act of ratification by a municipal body can only avail where there was original power and authority to perform the act to be ratified. If the act was void because *ultra vires*, and the municipality had no power to authorize it before it was undertaken and commenced, it has no power to adopt it after it is done.
8. Hence where Congress had deprived the Board of Public Works of the power to make a contract without a previous appropriation by law, and had forbidden the legislative assembly of the District to authorize payment of any contract made without express authority of law, the assembly was powerless by any subsequent acts of attempted ratification and adoption to validate a contract void for want of such an antecedent appropriation.
9. The power to waive all irregularities in the form and execution of the contracts resided with Congress alone.
10. The provisions of the act of June 20, 1874, disclose on the part of Congress, speaking as the supreme legislature of the District, a full recognition of the existence of the seven classes of claims enumerated in the sixth section of that act, and a waiver of all formal objections to their allowance, the plain purpose of the statute being to assist those whose claims in one form or another were obnoxious to objection; among such claims being those for work done and materials furnished for street improvements upon contracts with the Board of Public Works, which were originally void for want of an antecedent appropriation.

11. The fact that such a claim is presented for adjudication elsewhere than before the Board of Audit—the tribunal mentioned by the statute—does not revive and make effective the informalities cured by the act, as the waiver once established, remained in full force, and for all time as against whatever informalities the statute designed to hold as immaterial.

THE CASE is stated in the opinion.

BENJ. F. BUTLER, WM. A. COOK, and FRANK T. BROWNING,
for plaintiff.

RIDDLE & MILLER for defendant.

Mr. Justice HAGNER delivered the opinion of the court.

This case has been argued with elaboration and ability worthy of its importance, and has received at our hands a careful examination.

At the trial below, which consumed nearly eighty days, Mr. Justice Wylie presided, and the lengthy record bears ample evidence throughout of his learning and assiduous industry. It presents for our consideration the almost unprecedented number of fifty-four exceptions to rulings of the presiding judge upon a great variety of important questions. Many of these rulings are manifestly correct, but we are relieved from the necessity and denied the power of examining a great number of the alleged errors, by reason of the irregular and imperfect form in which they are set forth in the record. The reiterated decisions of the Supreme Court of the United States and of this court, have sufficiently warned counsel of the consequences of neglecting certain requirements in the preparation of their cases on appeal. We are not at liberty to consume the time of the court in the consideration of exceptions which would inevitably be held fatally defective by the Supreme Court on appeal from our decision. *Railroad Company vs. Varnell*, 98 U. S., 479; *Oliver vs. Cameron*, 8 Wash. Law Rep., 810.

We shall confine ourselves to the examination of such of the exceptions, sufficient in form, as involve the questions deemed by us important to the decision of the case before us.

This action was instituted by the plaintiff upon a number

of written contracts, executed by the District authorities, recited in the declaration, which, besides the common counts and accompanying bills of particulars, contained a count in *quantum meruit* upon the aggregated claims, amounting to \$268,502. Subsequently another suit was brought by the plaintiff against the District, upon other claims. The cases were consolidated, and a verdict for \$133,000 obtained by the plaintiff against the District, whose counsel, for certain reasons, refused to make defense at the trial. This verdict was set aside by this court in general term, and the consolidated cases remanded, and in the circuit court the order of consolidation was vacated and this suit tried separately, and a verdict rendered for the defendant under the instructions of the court.

By the act of Congress of 21st February, 1871, a new form of government was provided for the District of Columbia in lieu of the then existing municipalities. The extensive powers confided to the new government were coupled with various restrictions, some of which are unusual in municipal charters. The "organic act," as it is called, substituted a Board of Public Works, which was entrusted with entire control of the streets, their regulation and repair, and the disbursement of all moneys for their improvement. These powers were to be exercised in subordination to several stringent conditions, which, so far as the same are important here, are embraced in the following sections of the Revised Statutes of the District of Columbia, viz.:

"SEC. 77. The Board of Public Works shall have entire control of and make all regulation which they shall deem necessary for keeping in repair the streets, avenues, alleys, and sewers of this city, and all other work which may be entrusted to their charge by the legislative assembly or Congress."

"SEC. 80. All contracts made by the Board of Public Works shall be in writing, and shall be signed by the parties making the same, and a copy thereof shall be filed in the office of the secretary of the District."

"SEC. 81. The Board of Public Works have no power to

make contracts to bind said District to the payment of any sums of money, except in pursuance of appropriations made by law, and not until such appropriations shall have been made."

"SEC. 51. The legislature shall never grant or authorize extra compensation, fee, or allowance to any public officer, agent, servant, or contractor, after service has been rendered on a contract, or a contract made."

"SEC. 52. The legislative assembly shall never authorize the payment of any claim or part thereof, created against the District, under any contract or agreement made without express authority of law; and all such unauthorized agreements or contracts shall be null and void."

In this state of the law, the Board of Public Works entered into the contracts declared as in the declaration; and these are to be considered as entered into by the District government itself. *Barne's Case*, 91 U. S., 540.

The case was tried upon the pleas of non-assumpsit, payment, a final adjudication and award upon all claims of the plaintiff, and full payment under the award.

1st. The plaintiff, to maintain the issues on his part joined, offered to read in evidence to the jury, one of the contracts declared as No. 593, which embraced what was known as the Georgetown work. To the admissibility of this contract in evidence the defendant objected, "on the ground that said contract was invalid because there was no appropriation by law for doing said work and furnishing said material, at the time said contract was entered into." The same objection was interposed to the subsequent offer of other similar contracts; and the court instructed the jury that there could be no recovery upon any contract entered into in the absence of an antecedent appropriation, notwithstanding the jury might believe the work had been performed and materials furnished in alleged conformity to the contracts so offered in evidence.

We have no question, upon the facts, that there was no such antecedent appropriation; and the first inquiry is as to the correctness of the several rulings upon this point, at different stages of the trial.

In our opinion they were entirely proper. There is no uncertainty about the language of the organic act on this point. It explicitly denied to the Board of Public Works all power of making contracts to bind the District "until such appropriation shall have been made." All such "mentioned contracts or agreements," it is declared, "shall be null and void," and the legislative assembly was forbidden to authorize the payment of any claim against the District, "upon any contract or agreement made without express authority of law."

Congress unquestionably had the right to make such provisions, and as long as a contract remained under this Congressional condemnation there could be no recovery upon it. To decide otherwise would be in flagrant contempt of the plain injunction of the statute.

2d. The plaintiff then insisted that notwithstanding the invalidity of the contracts, it was competent for him to recover for the work performed under them upon the *quantum meruit* count, but the presiding judge instructed the jury that there could be no recovery in respect of said work upon the count of *quantum meruit*, and this ruling presents the next question for our consideration.

It is insisted, upon behalf of the plaintiff, that his right to recovery, as thus claimed, is established by the decision of the Supreme Court in the case of *Clark vs. United States*, 95 U. S., 539.

In our opinion that decision does not sustain this contention of the plaintiff, in view of the wide difference between the cases.

An act of Congress declared it the duty of the Secretaries of War, of the Navy and of the Interior, to require all contracts made in behalf of the government, by them or their officers, to be in writing, signed in a particular manner by the parties and returned to the Department with certain attendant formalities.

A quartermaster on the Rio Grande, with the approval of his commanding officer, entered into an oral agreement with the owner of a steamer, to pay \$150 per day for its use; but

no specific contract was made, *or to be made*, until a trial trip should have been completed, under the charge of the Government servants to ascertain her fitness for the service required; if the trip should prove satisfactory, the parties were then to enter into a formal written contract for her hire. It was further agreed, orally, that the trial trip was to be at the expense of the United States, and if the steamer should be lost during the trip, the Government was to pay for her, whatever should be estimated as her value by three disinterested men. During the trial trip, the vessel was wrecked while in charge of the quartermaster's men, and the owner claimed the amount of the assessed loss, and \$1,200 for eight days' hire, and filed his claim in the Court of Claims for both amounts. That court held that the provision of the statute requiring written contracts was mandatory, and refused relief upon this ground, for either claim.

The Supreme Court affirmed the ruling as to the value of the vessel, but held that under the forms of proceeding in the Court of Claims, the claimant might recover the hire after the Government had enjoyed the use of the vessel, as upon an implied contract for a *quantum meruit*, although such was not the form of his demand.

The case was certainly one of hardship; for the Government had actually enjoyed the use of the vessel, and it was destroyed in its service, while in charge of its servants.

The Court of Claims is vested with jurisdiction to determine upon any contract, express or implied, with the United States, and it is bound by no special rules of pleading. But the present suit is pending in a court of law; brought, not at large, for services in the absence of any agreement, but upon express written contracts, framed by the parties in contempt of the inhibitions of a statute plainly denouncing them as void and expressly forbidding their payment. In Clark's case it appeared that no contract was made, or was intended to be made, until the return of the vessel from her trial trip, and the claim was only supported upon the idea of an implied contract, in the absence of any express agreement, as though, for example, the vessel had been impressed for eight days upon a public emergency.

But, as was remarked by Mr. Justice Miller, in his dissenting opinion, the statute contained no declaration that a parol contract made by a quartermaster, "shall be void, or that it shall not be enforced, or that no suit may be sustained on it. There is no language in it addressed to the party contracting with the Government."

The organic law of the District contains all these declarations in language unmistakably emphatic. It would be imputing to Congress a lamentable lack of wisdom to suppose that the plain purpose of the statute—to endeavor to curb extravagance by requiring a previous appropriation for expenditures under contracts—could be successfully evaded by so shallow a contrivance as that here relied upon.

To allow a recovery upon a *quantum meruit* for the recovery of money claimed to be due for work done under a contract which the law has pronounced void, and payment of which is forbidden by law, would render the whole inhibition futile, and virtually work a repeal of the statute, while opening the door to a greater evil than the statute was designed to prevent.

The consideration that the plaintiff was probably ignorant of these provisions of the organic act, was urged in his behalf as a reason why they should not be invoked against him.

Unfortunately for this pretension, one of the contracts in the record, signed by Strong, expressly provides that it "shall be subject to any and all the provisions of the act of 21st of February, 1871, so far as the same shall or may be in any respect applicable to said contract," and a very slight examination of the statute thus referred to would have advertised him of the sole condition upon which the Board of Public Works had authority to enter into a contract with him.

But apart from actual knowledge, the law imputes to the plaintiff full information of the provisions of this public statute, and he is not to be heard to plead ignorance on the subject. The court, in *State vs. Kirkley*, 29 Maryland, 110, says, "no principle relating to municipal corporations is more firmly established than that those who deal with their

agents or officers must, *at their peril*, take notice of the limits of the powers both of the municipality and of those who assume to act as its agents and officers." And the Supreme Court says, in Clark's Case: "Every man is presumed to know the law, and if he makes a contract with a public officer in contempt of the requirements of the statutes, he becomes knowingly an accessory to its violation." 95 U. S., 542.

We are therefore of the opinion that there could be no recovery, either upon these contracts themselves or for the work done under them, under a *quantum meruit*, so long as the contract remained obnoxious to the inhibition of the organic act, and that the rulings of the presiding judge below upon this point were correct.

3d. The plaintiff then offered in evidence sundry acts of the late legislative assembly of the District of Columbia, which, as he insisted, recognized and ratified the contracts thus objected to, and cured whatever defects, in form or substance, were relied on to prevent recovery upon them by the plaintiff.

The presiding judge ruled that these acts were insufficient and incompetent for the purpose indicated; and in our opinion this ruling was correct.

Whatever thing the organic law forbade the Board of Public Works to perform, it was powerless to accomplish either directly, in the first instance, or indirectly by its recognition or adoption after an infraction of the law by its attempted performance.

The Board of Public Works was one of the agencies of the District government, and the legislative assembly was simply another of those agencies; and if the act attempted by the agents first-named was void under the law, and incapable of validation by its subsequent ratification by that agent itself, it is difficult to understand how an attempted validation by the other agent could be effectual. It would be to work a total destruction of the safeguard Congress had seen fit to interpose against lavish expenditure by requiring the publicity of previous appropriation, if a second and

more glaring contempt of the law could be allowed to condone its previous violation. Two such wrongs could not make one right, even in the form of an appeal from Philip, dazed with the extent of his wasteful extravagance, to the same Philip not yet sobered from financial intoxication.

In *Marsh vs. Fulton County*, 10 Wallace, 678, the Supreme Court announces the principle, that an act of ratification can only avail where there was originally power and authority to perform the act to be ratified. As the District government possessed no power to make a contract without a previous appropriation by law, it was, therefore, powerless to ratify its own unlawful act. In *Horn vs. Mayor and City Council of Baltimore*, 30 Md., 224, the court, discussing the attempted ratification of an illegal contract, says: "It is wholly immaterial whether the mayor and city council, by a subsequent ordinance adopted and ratified the grading of the avenue. If the act was void, because *ultra vires*, and they had no power to authorize it before it was undertaken and commenced, they certainly had no power to adopt it after it was done."

4th. The plaintiff then read in evidence several acts of Congress, with reference to the District of Columbia, and claimed that they contained such adoption and ratification of the contracts, by Congress, as justified a recovery for the work performed under them. But the court held that no sufficient ratification appeared upon a proper construction of the statutes relied on.

We have no doubt that Congress possessed the power to waive all irregularities in the form and execution in the contracts, and that the power resided with Congress alone.

In *Mattingly's Case*, 97 U. S., 690, the court says: "If Congress had power to commit to the Board of Public Works the duty of making the improvement and to prescribe that the assessments should be made in the manner in which they were made, it had the power to ratify the act it might have authorized. * * It may, therefore, cure irregularities and confirm proceedings which, without the confirmation, would be void, because unauthorized, provided such confirma-

tion does not interfere with intervening rights. Judge Cooley, in view of the authorities, asserts the following rule: "If the thing wanting, and which failed to be done, and which constitutes the defect in the proceeding, is something, the necessity for which the legislature might have dispensed with, by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute; and if the irregularity consists in doing some act, or in the mode or manner of doing some act which the legislature might have made immaterial, by prior law, it is equally competent to make the same immaterial by subsequent law." Cooley Const. Lim., 871.

Has Congress exercised this power of ratification in the statutes referred to?

On the 20th of June, 1874, after the completion of the greater part of this work, Congress again changed the form of the District government and substituted three Commissioners as the governing power of the District, in place of the governor and legislative assembly. In the second section of this act, among the enumeration of powers of the new officials, they were authorized to apply the taxes and other revenues of the District to the payment of "debts due to laborers and employees of the District and Board of Public Works;" and they were forbidden to incur obligations, except for designated objects, one of which is declared to be "the protection or preservation of improvements existing, or commenced and not completed at the time of the passage of this act."

By the sixth section it was made the duty of the Comptrollers of the Treasury, who were thereby "constituted a board of audit, to examine and audit for settlement all the suspended and floating debt of the District of Columbia and of the Board of Public Works, hereinafter specified, namely, *first*, the debt evidenced by sewer certificates; *secondly*, the debt purporting to be evidenced and ascertained by certificates of the auditor of the Board of Public Works; *thirdly*, the debt evidenced by the certificate of the auditor and Comptroller of the District of Columbia; *fourthly*, claims

existing or hereafter created, for which no evidence of indebtedness has been issued, arising out of contracts, written or oral, made by or on behalf of the Board of Public Works; *fifthly*, claims for which no evidence of indebtedness has been issued arising out of contracts, written or oral, made by or on behalf of the District of Columbia; *sixthly*, all claims for private property taken by the Board of Public Works from the avenues, streets and alleys of the cities of Washington and Georgetown; and, *seventhly*, all unadjusted claims for damages that may have been presented to the Board of Public Works pursuant to an act of the legislative assembly of the District of Columbia, "entitled an act," &c. And the section proceeds to direct the board of audit to issue to each claimant a certificate signed as therein specified, "stating the amount found to be due to each and on what account." And the board of audit is further required to examine and accurately ascertain the indebtedness of the District, and to report the result of their investigations to Congress.

Section 7 authorizes the issuing of what are known as the 3.65 bonds of the District, which are to be exempt from taxation by federal statute or municipal authority, and the faith of the United States, it was declared, was thereby pledged that the interest should be punctually paid upon said bonds, and a sinking fund provided for their redemption—the bonds to be registered in the office of the Register of the Treasury under provision to be made by the Secretary of the Treasury. This section contains the further requirement—"the sinking fund commissioners are hereby authorized to exchange said bonds at par for like sums of any class of indebtedness in the preceding section of this act named, including sewer taxes or assessments paid, evidenced by certificates of the auditing board provided for in this act."

We think the provisions of this statute disclose on the part of Congress, speaking as the supreme legislature of the District, a full recognition of the existence of the seven classes of claims enumerated in the sixth section, and a waiver of all formal objections to their allowance. Important

Treasury officers were directed to examine and audit these claims "*for settlement*;" to issue their certificates, stating the amount *found to be due* to each and on what account," and to transmit a register of such certificates to Congress and to the comptroller of the District. Any person comprehended within either of the enumerated classes, although his claim might be informal or irregular, was entitled to receive a certificate for the amount *found due* to him, and to exchange the same for a \$3.65 bond for the security of which the public faith of the nation was effectively pledged. Indeed, the purpose of the statute plainly was to assist those whose claims, in one form or another, were obnoxious to objection. There was very slight necessity, or none, for any such aid to those whose claims were in all respects regular—it was the invalid claims alone that needed the aid of the Congressional physician. Among the enumerated classes were claims upon *oral* contracts. Such contracts were expressly forbidden by the organic law, which pointed out with precision the formalities of writing, signing and filing indispensable to the validity of all contracts of the District. That these requirements were mandatory cannot be doubted under the decision in Clarke's case, and their omission absolutely invalidated the claim. And yet the board of audit was expressly required to issue their certificates for the amount *found to be due* upon such oral contract, and the claimants were entitled to receive the guaranteed bonds in lieu of these certificates. Can it be doubted that Congress intended to waive the want of writing in the cases referred to? In our judgment a similar waiver was designed, of whatever other formalities might appear on presentation in all other claims described in the sixth section of the act of 1874; and claims like those of the plaintiff were comprehended in the enumeration in that section. This construction derives great support from the provision in the second section, authorizing the Commissioners to apply the revenues to the payment of debts due to laborers and employees, and to incur obligations to preserve and protect improvements not yet completed,

without reference to whether the work was performed under formal contracts or not.

The Supreme Court has considered the sufficiency and effect of Congressional recognition or waiver of formal objections to claims against the District in Mattingly's Case, before referred to. 97 U. S., 657.

The District authorities had undertaken to collect certain sewer assessments, for work done under the direction of the Board of Public Works. Mattingly and his co-complainants insisted that the assessments were attended by such numerous and fatal defects and omissions that they were illegal and void and incapable of enforcement; and such was the decision of this court in general term. But the Supreme Court declined to inquire whether these objections were well founded, because, as they said, Congress by subsequent law had directed the Commissioners of the District to enforce the collection of all assessments for special improvements as charges upon the property benefitted; and had also authorized their revision and correction. "The meaning of this act," says the court, "is not to be mistaken. It was practically a confirmation of what the Board of Public Works had done. It is not to be conceded that Congress ordered the collection of assessments which it regarded as illegal. We are, therefore, of the opinion that the assessments have been ratified by Congress."

So, in our judgment, "it is not to be conceded that Congress authorized the issue of certificates and their exchange for bonds guaranteed by the nation, in settlement of claims which it regarded as illegal." We think the evidence of ratification of informal claims, by the act of June, 1874, was much more explicit than that afforded by the statute which the Supreme Court regarded as sufficient in Mattingly's Case.

It was suggested that even if evidence of Congressional ratification or confirmation could be gathered from the act of 1874, still its curative effect was designed only to be in force while the scheme of the act was pursued, and that the former informalities became effective if the claims were presented elsewhere than before the Board of Audit. But in

our opinion that waiver once established remained in full force for all time, everywhere, as against whatever informalities the statute designed to hold as immaterial.

The rulings of the learned judge, which we have thus felt obliged to dissent from, excluded from the jury the consideration of four of the contracts declared upon, and so seriously affected the plaintiff's presentation of his case, that we have no alternative but to reverse the judgment below and remand this cause for a new trial.

We desire particularly to say that we have no purpose to pass upon the sufficiency of the defense, that all the plaintiff claims has been settled by submission and award, and that the plaintiff has been overpaid for all work he has done for the District.

Finding the serious error we have been considering, it is unnecessary to express further our views upon such of the remaining questions as have been presented to the court in proper form.

Judgment reversed and cause remanded for new trial.

JOHN E. KENDALL vs. WILSON GRICE ET AL.

AT LAW NO. 21,823.

{ Decided Nov. 21, 1881.

{ The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

1. The engagement of a surety cannot be enlarged or varied without his consent: thus, defendants were sureties on an appeal bond, conditioned to pay intervening damages and costs. Afterwards the principal confessed judgment on the plaintiff agreeing to stay execution for thirty days; all this without the knowledge or consent of the sureties.

Held. That giving stay of execution on the judgment, without the consent of the sureties discharged them.

The CASE is stated in the opinion.

R. ROSS PERRY for plaintiff.

E. A. NEWMAN, for defendants, cited the following authorities:

4 Wash. C. C., 620; 7 Cowen, 48; 13 Wend., 72; 3 Johns., 528; 1 Johns. Cas., 23; 23 Barb., 481; De Golyar on Prin. & Sur., 360, 407; 2 Ves., jr., 540; 3 Wash. C. C., 70; 23 Ill., 62; 5 Gill & J., 344; 6 Pet., 250; 2 Swanst., 198; 6 Ala., 718; 1 Stew. (Ala.), 262; 3 Bibb, 467; 3 Denio, 878; 1 Call. (Va.), 15; 1 Munf., 269; 2 Rand., 333; 5 Ohio, 208; 6 Ib., 17; 7 Johns., 331; 1 Paine, 306.

Mr. Justice HAGNER delivered the opinion of the court.

This action was brought by Kendall against the defendants, who were sureties upon the following bond signed by Benjamin Thompson and themselves:

“ Know all men that we, Benjamin Thompson, and Wilson Grice, and Dennis Wallace, of the District of Columbia, are held and firmly bound unto John E. Kendall in the just and full sum of \$200, to the payment of which, &c., &c. Sealed with our seals and dated the 14th day of December, A. D. 1878.

“ Whereas, in a suit instituted under the provisions of the act of Congress, approved July 4, 1864, entitled, ‘an act to regulate the proceedings in cases between landlords and tenants in the District of Columbia,’ before C. S. Bundy, and transferred to Sam. M. Wilcox, justice of the peace in and for the District of Columbia, by John E. Kendall,

against the said Benjamin Thompson, to recover possession of the premises described in the complaint filed in said suit, the said defendant pleads title in himself. Now the condition of the above obligation is such that if the said Benjamin Thompson shall pay to the said John E. Kendall all intervening damages and all reasonable intervening rent for said premises, and all costs adjudged against him in the Supreme Court of the District of Columbia, then the above obligation to be null and void, otherwise to be and remain in full force and virtue in law."

At the trial the plaintiff offered the bond and evidence, and proved that in the suit described in the bond (Kendall vs. Thompson, at law, No. 20,317) in the circuit court, judgment had been entered for the plaintiff, the landlord, against Thompson, the tenant, for possession of the premises referred to, and also for \$175 damages and intervening rent and costs; and that a *fi. fa.* had been issued upon the judgment and returned *nulla bona*, and there rested.

The defendant then offered to prove that on the 17th of February, 1880, the said landlord and tenant suit was on the assignment for trial in the circuit court, and the parties were ready with their witnesses, but it was probable that said case would not be reached for trial for several days; that said Kendall and said Thompson on said day entered into a parol agreement whereby in consideration that the said Thompson would confess judgment to the said Kendall for the possession of the real estate and the sum of \$175, as intervening rent and damages, he, the said Kendall, would stay execution on said judgment for the period of thirty days from its date; that Thompson, in pursuance of said agreement, then and there confessed judgment for possession and \$175, and said Kendall did there and then cause to be entered a stay of execution upon the judgment for thirty days; but the plaintiff objected to the admissibility of said testimony, and the court overruled the objection and allowed the witness to testify to the facts set out in said offer, and the witness did so testify.

The plaintiff excepted.

And the defendants further proved that neither of them knew of this agreement or consented to the stay of execution.

The court instructed the jury that if they found from the evidence that the stay of execution was entered under such agreement without the knowledge, consent, or acquiescence of the defendants, the present action against them as sureties could not be sustained. The verdict was for the defendants.

The propriety of these rulings is the matter for our determination.

The general principle is perfectly familiar, that if a creditor, by a binding agreement, made without the knowledge or consent of a surety, gives time to the principal debtor by enlarging the period of payment mentioned in the contract under which the surety has agreed to become bound, such enlargement of time discharges the surety from all further liability upon the contract. And a stay of execution upon a judgment against principal and surety, without the assent of the surety, is such a giving of time as discharges the surety. State, use of Barber, *vs.* Hammond, 6 G. & J., 168; Bank *vs.* Hoge, 6 Ohio, 17; Mayhew *vs.* Lockett, 2 Swanst., 193.

The engagement of the surety is not to be enlarged or varied without his consent. Any agreement to do so by the creditor is an attempt on his part to make for the surety a new contract to which he never assented. The time of payment may be quite as important a consideration to the surety, as the amount he has promised conditionally to pay. He may have agreed to become responsible, because he then had in his possession property of the principal debtor sufficient to indemnify him against loss. When the time fixed in the contract has passed without notification to him of the default of the principal, he may naturally suppose his liability to be at an end, and thus release the means of reimbursement, to his ultimate loss, if the changed contract is subsequently enforced against him. Again, the surety has the right, on payment of the debt, to be subrogated to all the rights of the creditor, and to proceed at once to collect it from the principal; but

if the creditor has tied his own hands from proceeding promptly, by extending the time of collection, the hands of the surety will equally be bound; and before they are loosed, by the expiration of the extended credit, the principal debtor may have become insolvent and the right of subrogation rendered worthless.

It is also well settled that it is unimportant whether the extension given has actually proved prejudicial to the surety or not. The rule we have stated is quite independent of the event, and the fact that the extension granted promised to be beneficial to the surety would give no right to the creditor to change the terms of the contract without the knowledge or consent of the guarantor.

The plaintiff insists that the present case is not within the operation of these principles, because the alleged giving of time was not upon *the bond sued on*, but upon another indebtedness, ripened into judgment, to which the surety was no party.

The purpose in giving the bond was to secure the payment of "all intervening damages and all reasonable intervening rent" that might be adjudged against the principal obligor. The obligation to pay *the judgment* was the only liability created against the surety, and this was adopted into the bond. If that should be *paid* by the principal, the surety of course would be discharged. It would scarcely be gravely contended that the surety would remain bound if the creditor had *formally released* the principal from the judgment, out and out. Interference with the judgment in either of these respects, would certainly discharge the surety, and yet such would not be the case if the contention of the plaintiff were to be sustained, for it could equally be insisted with respect to these acts of the principal that they took place in a case to which the surety was no party. The judgment was in fact incorporated in the bond, and whatever operated to release the judgment, in this respect, operated to exonerate the surety. Such a proposition as that contended for by the plaintiff has never been considered as a proper construction of the law and we have been referred to no authorities in its

support. It is not always easy to find decisions in opposition to clearly untenable positions, but we will refer to two cases where the point was met and overruled. In *Smith vs. Slidler*, 3 Pittsburg Rep., 550, a suit was brought upon a bond, conditioned like that in the present case to secure the payment of a claim therein described, to which the surety to the bond was no party. The creditor gave a stay of execution of ninety days on the judgment recovered upon the cause of action designed to be secured by the bond, without the assent of the surety to the bond. The court held that the legal presumption was the surety was prejudiced by the delay—that as the creditor, by giving the stay of execution had tied his own hands, he, by that act, disabled the surety from proceeding to enforce his right of subrogation, and having this changed the contract without authority, the surety stood discharged. To the same effect is the decision in *Ren vs. Kirk*, 18 Hunn, 210.

We think the rulings held were correct, and they are affirmed.

THE UNITED STATES, EX REL. THE WILCOX & GIBBS SEWING
MACHINE COMPANY,

vs.

E. M. MARBLE.

AT LAW. No. 22,947.

{ Decided November 30, 1881.

{ The CHIEF JUSTICE and Justices WYLLIE and JAMES sitting.

1. The several acts of Congress regarding the registration of prints designed to be used as labels, do not exclude from registration a label containing matter which might be registered as a trade-mark, nor does the fact that a label, bearing such distinguishing marks as entitle it to registration as a trade-mark, exclude it from registration as a label if the owner desires it to be registered as such; whether the Commissioner of Patents is to regard it as the one or the other, depends wholly upon the will of its proprietor.
2. The owner of a label entitled to registration under the law made application to the Commissioner of Patents for its registration, applicant had complied with all the requirements of the law, but the examiner in charge of that department of the Patent Office rejected the application on the ground that the label was not of the class entitled to registration, whereupon applicant, instead of appealing to the Commissioner of Patents, as he might have done, petitioned this court for a *mandamus* to compel the Commissioner to register the label, the Commissioner, in his answer to the rule to show cause, recited the facts of the failure of the applicant to appeal to the Commissioner from the examiner's decision, but at the same time approved of and endorsed the reasons of the examiner for refusing to register the label.

Held, That a peremptory *mandamus* to register the label should issue, and so ordered.

STATEMENT OF THE CASE.

This was an application for *mandamus* against the Commissioner of Patents, which was ordered to be heard in the General Term in the first instance.

The petition sets forth that the relator, a corporation under the laws of the State of New York, had, on or about the 3d day of May, 1881, made application under the act of Congress approved June 18th, 1874, entitled "An act to amend the law relating to patents, trade-marks and copyrights," to the Commissioner of Patents, for the registration of a label designed to be used for hosiery or other knit goods made in accordance with certain improvements for which it had obtained Letters-Patent of the United States, and had paid to the said Commissioner the sum of six dollars, the

fee required by law in such cases, and that thereupon it became the duty of said Commissioner, under the said act of Congress, to cause said label to be registered ; yet the said Commissioner had refused to register said label or cause the same to be registered, to the great injury of relator, &c.

The petition concluded with a prayer that an alternative writ of mandamus be issued directed to said Commissioner, commanding him to cause said label to be registered, or show cause for his refusal so to do.

The writ having issued, the answer of respondent was as follows :

“ The respondent, E. M. Marble, Commissioner of Patents, makes return to the order of the honorable the Supreme Court of the District of Columbia, in the above-entitled matter, to show cause why a writ of mandamus should not issue against him as prayed by the relator, as follows :

“ It appears by the records and files of this Office that on May 3, 1881, the relator filed an application for the registration of what it alleged to be a label, paying the fee of six dollars, the amount required by law for the registration of labels ; that on the 6th of the same month applicant was notified by the examiner having charge of the registration of labels that the monogram formed of the letters W and G, forming part of the alleged label, could not be registered because it amounted to a trade-mark ; that subsequently, and on the 10th of the same month, Mr. Pollok, the attorney of said corporation, having filed his power of attorney, requested to be advised on what ground the label was rejected, stating that the same was a label and not a trade-mark ; and that on the 14th of the same month the said examiner again informed applicant, through its attorney, that the application could not be allowed for the reasons given in his former letter.

“ It will thus be seen that all action taken in the Office upon the application of the relator was by the examiner having charge of applications for the registration of labels.

“ While it is true that the Commissioner of Patents is charged with the transaction of all business done in the

Patent Office, it is also true that he cannot and does not know of the pendency of individual applications except such as are brought to his attention on appeal or by inquiry for instruction by examiners.

“The first actual knowledge that the respondent had of the pendency of the application in question was the service upon him of the order to show cause why the writ of mandamus shall not issue compelling him to register applicant’s alleged label.

“The practice of the Office allow parties whose applications are rejected by examiners to have the decisions of the examiners rejecting such applications reviewed on appeal by the Commissioner. No appeal of this kind was taken by applicant although its attorney, at least, must have known, and did know what the practice of the Office in such cases is.

“It is respectfully submitted, therefore, that the application for a writ was premature, for the reason that the respondent should not be called upon to show cause why such writ should not issue until the case or matter which the relator complains of has been brought to his personal attention.

“It cannot be said that applicant’s petition has been denied by the Commissioner of Patents, in view of the practice of the Office, until the Commissioner has some personal knowledge of his application, and while applicant has a remedy in the Office for the correction of what he believes to be erroneous action, he has no ground to ask for the intervention of this court by writ of mandamus to compel an officer to do what upon application to that officer might have been done.

“For further answer, I respectfully submit that the Commissioner of Patents must determine what is and what is not proper subject-matter for registration as a label.

“The statute says: ‘There shall be paid for recording the title of any print or label, *not a trade-mark*, six dollars, which shall cover the expense of furnishing a copy of the record, under the seal of the Commissioner of Patents, to the party entering the same. The statute also prescribes that a fee of twenty-five dollars shall be paid for the registration of a trade-mark.

“It becomes necessary, therefore, in each and every case for the officer whose duty it is to receive and register labels and trade-marks, to determine upon the receipt of such applications whether they belong to one or the other class, and upon such determination to require the payment of the fee which the law prescribes.

“Such has been the practice of this Office since the passage of the laws providing for the registration of trade-marks and of labels.

“A trade-mark is defined by Webster to be : “A distinguishing mark or device used by a manufacturer on his goods or labels, the legal right in which is recognized by law.” A label is defined to be : “First, a tassel ; second, a narrow slip of silk, paper, parchment, &c., affixed to anything denoting its contents, ownership, and the like, as the label of a bottle, or a package ; third, a ribbon or silk, a slip of paper, parchment, &c., attached to a diploma or legal document to hold the appended seal ; fourth, any paper annexed to a will by way of addition, as a codicil.”

“It must be presumed that Congress in passing the laws providing for the registration of trade-marks and labels intended that certain fees should be paid for the registration of what was then known and recognized as labels and as trade-marks. It is not competent for a party to state that this or that is a label, and this or that is a trade-mark, and thus determine its character.

“Whether it is a label or whether it is a trade-mark must be determined by the definition which has been given and accepted everywhere as clearly and fully covering the meaning of those words.

“The action taken by the examiner in this case was in accordance with the well-settled rulings and decisions of the Office. He refused to allow applicant to register as a label subject-matter clearly and undeniably included within the definition of a trade-mark, as he would have denied the registration of any application for a trade-mark of subject-matter properly registrable as a label.

“I submit that the writ should be denied for the following reasons :

“First. Because the registration of the alleged label has never been denied by the respondent.

“Second. Because the alleged label contains subject-matter clearly registrable as a trade-mark, and therefore not registrable under the statute as a label.”

“E. M. MARBLE,
“ *Commissioner of Patents.*”

A report of the examiner having charge of the registration of labels, addressed to the Commissioner, giving his reasons for refusing to register the label, accompanied the foregoing answer, and was as follows :

“SIR: In the matter of the application of the Wilcox & Gibbs Sewing Machine Co. for registration of a label ; wherein on petition of A. Pollok, esq., a rule to show cause why registration has been refused by the Office has been issued by the Supreme Court of the District of Columbia, and referred to me by yourself for report as to the examiner’s action on the case ; I have the honor to report :

“On the 3d of May, 1881, the above-named company duly filed an application for the registration of a label for hosiery, paying the fee of six dollars required by law. On the 6th of May a letter was written to applicant (not at that time represented by attorney) in which they were informed that the monogram formed of the letters W & G forming part of the alleged label could not be registered for the reason that it amounted to a trade-mark.

“On the 10th of May Mr. Pollok, now appearing as attorney for the applicant, filed an argument in which he questioned the right of the Office to determine that matter presented as a label could be rejected for the reason given, and advised the Office that the label was not a trade-mark. The examiner’s second letter merely repeated the former action citing a decision of the Commissioner in support thereof.

“The case having been twice rejected was now in condition for appeal to the Commissioner in person, the usual and recognized recourse in label cases when registration has been

refused by the examiner, but the record shows no such step taken in that direction.

“As regards the merits of the case the examiner is guided in his practice by former decisions based upon the act of June 18, 1874, by which the Office is necessarily governed.

“This act distinctly excludes trade-marks from the protection it was designed to afford.

“In the case of *Simpson & Sons*, 10 O. G., 333, the acting Commissioner sustained the examiner in his refusal to register a label in which the arbitrary word word “Eddystone” was included. He says :

‘Applicant will be permitted to register the name of his firm, their place of business, description of the nature, quality, and quantity of his parcels, *as a label* ; but he cannot be allowed to claim the arbitrary words and fanciful figures mentioned as part of the label. *These should be registered as a trade-mark.*’

“In the case of *Ex Parte Thaddeus Davids & Co.*, 16 O. G., 94, cited in examiner’s second letter, the Commissioner held that ‘the presence in a label of matter registrable as a trade-mark excludes the whole from registration.’

“There appears never to have been any question in the Office that a monogram such as that shown in applicant’s *fac simile* constituted a registrable trade-mark.

“The fact that from time immemorial monograms have been regarded as trade-marks, is set forth in *Browne on Trade-Marks*, paragraphs 15 and 262, and the Office practice has been in accordance with this doctrine.

“The examiner cannot find that it has ever been disputed, but it is clearly laid down in Commissioner M.’s decision in the case of the *Dr. Harter Medicine Co.*, July 29, 1879. This was an appeal from the examiner’s refusal to register a trade-mark in which certain descriptive matter was shown in connection with a monogram, and the acting commissioner said :

‘Applicant may amend its application and restrict the trade-mark to the monogram and shield. The balance of the label should be registered as a label.’

“ With the doctrine and practice so clearly established, as these rulings indicate, there has never been any room for question as to the propriety of the examiner’s action. If applicant deemed it erroneous, it was so because the decisions on which it was based were erroneous, and this applicant has an opportunity to show whenever he chooses to avail himself of the rehearing by the Commissioner in person to which he is entitled.

“ Respectfully submitted,

“ N. A. SEELY,

“ *Examiner of Trade-Marks.*”

A. POLLOK argued the case for the relator.

Mr. Justice JAMES delivered the opinion of the court.

The relator claims the right to have its label registered in the Patent Office, as a label designed to be used on an article of manufacture, under the act of June 18, 1874. In order to ascertain the intent of that act it will be necessary to refer to the statutory provisions relating to the same matter existing at the time of its passage.

Section 4937 of the Revised Statutes provided as follows :

“ Any person domiciled in the United States * * * who intends to adopt and use any trade-mark for exclusive use within the United States, may obtain protection for such lawful trade-mark by complying with the following requirements : First. By causing to be recorded in the Patent Office a statement specifying the names of the parties * * * who desire the protection of the trade-mark ; the class of merchandise, and the particular description of goods comprised in such class, by which the trade-mark has been or is intended to be appropriated ; a description of the trade-mark itself, with fac-similes thereof, showing the manner in which it has been or is intended to be applied or used, and the length of time, if any, during which the trade-mark has been in use. Second. By making payment of a fee of twenty-five dollars,” &c.

Section 4939 excluded from the class of registrable trade-marks any mark which was merely the name of a person, un-

accompanied by a mark sufficient to distinguish it from the same name when used by other persons.

The sections applied to trade-marks which were in the form of *labels* bearing distinguishing marks.

It was at the same time provided by section 4952 that—

“Any citizen of the United States, or resident therein, who shall be the author, * * * designer, or proprietor of any * * * engraving, cut, print, &c., shall, upon complying with the provisions of this chapter, have the sole liberty of printing, * * * publishing * * * and vending the same.”

Sections 4956 and 4957 contain the provisions referred to, namely, for the deposit of copies and the recording of a description of such engraving, cut or print in the office of the Librarian of Congress. As the application of these sections did not depend upon the importance of the print, they, of course, included prints which were to be used merely as labels.

It is plain that these contemporaneous provisions relating to trade-marks and prints, authorized any person who owned a label bearing distinguishing marks to have it recorded in the Patent Office as a trade-mark, or, if he preferred to do so, to have it registered in the office of the Librarian of Congress as a mere print. It must bear such distinguishing marks in order to be admitted to record as a trade-mark; but the fact of bearing them did not exclude it from registry as a print. The Librarian of Congress had no discretion to refuse to recognize it as a print, because it *could* be recognized by the Commissioner of Patents as a trade-mark. Whether it should be treated as the one or the other, depended wholly on the will of its proprietor. It was for him to determine whether he would adopt it as his trade-mark, and whether he would make the declarations necessary to that end.

When the registering of such prints as were designed to be used as labels on manufactures was transferred from the office of the Librarian of Congress to the Patent Office, by the act of 18th of June, 1874, was this choice of the owner

of the label as to the character which it should have, and the purposes which it should serve, taken away?

The first action of that act provides that no person shall maintain an action for the infringement of his copyright of any book, "print, cut, engraving," &c., unless he shall give notice thereof by inscribing upon some visible portion of such book, prints, engraving, certain words. The third section provides: "That in the construction of this act, the words 'engraving,' 'cut,' and 'print,' shall be applied only to pictorial illustrations or works connected with the fine arts. And no prints or labels designed to be used for any other article of manufacture shall be entered under the copyright law, but may be registered in the Patent Office. And the Commissioner of Patents is hereby charged with the supervision and control of the entry or registry of such prints or labels, in conformity with the regulations provided by law as to copyright of prints; except that there shall be paid for recording the title of any print or label not a trade-mark, six dollars, which shall cover the expense of furnishing a copy of the record under the seal of the Commissioner of Patents, to the party entering the same."

After the passage of this act the Commissioner of Patents was charged with two distinct duties relating to labels. If any person, intending to adopt a particular label as his trade-mark, desired to obtain protection for it, the Commissioner was bound, provided it bore the necessary distinguishing marks, to cause to be recorded the statement of the owner specifying the facts prescribed by the statute. He was now required to register also labels which were not trade-marks. But was he clothed with power to control the entry of labels so far as to determine that a label which, by reason of its distinguishing marks, might have been entered as a trade-mark, should not be admitted to registry as "a label not a trade-mark?" The only reference to any control to be exercised by him, is found in the clause which provides that he shall have "control of the entry or registry of such prints or labels, in conformity with the regulations provided by law as to copyright prints." But this is merely the same control which has been exer-

cised over the registering of these labels, as copyright prints, by the Librarian of Congress by authority of section 4948 of the Revised Statutes, and in conformity with the regulations found in sections 4956 and 4957 ; and such control did not, as we have already said, include authority to exclude from the registry any particular print on the ground that it should more properly be entered at the Patent Office as a trade-mark. Of course, then, when this control over the registry of the same prints, now called "labels which are not trade-marks," was transferred to the Commissioner of Patents, it had only the same limited application, and did not include any discretion to determine whether a particular label should be classed as a trade-mark or as a label only. Congress had intended to take away from the owner of a label his former right to determine what use he should make of it, and how he would have it entered, that intention would have been plainly expressed. The actual intention was merely to change the place of registry. When an applicant for registry complies with all the requirements of the lawful regulations, as the relator appears to have done, the function of the Commissioner is merely ministerial. The peremptory writ will issue accordingly.

OSCAR A. STEVENS, Trustee,

vs.

EDMUND L. DU BARRY ET AL.

AT LAW. No. 19,599.

{ Decided Nov. 21, 1881.

{ The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

Defendant, having been sued at law upon a promissory note, filed a bill in equity to enjoin the suit, on the ground that he had a complete defense in equity, by reason of certain credits that would amount to a payment of the note. Subsequently, and before the hearing in equity, he filed a plea of "payment" in the case at law. A final decree was afterwards passed dismissing the bill, and then, on the trial of the suit at law, the plaintiff, to meet the defendants' plea of payment, offered in evidence the decree, and asked the court to instruct the jury that this decree closed all defense as to any alleged payment on account of the note, which the court refused to do. *Held*, Error, for the reason that equity, having taken jurisdiction of the cause, had necessarily gone into the condition of accounts between the parties to ascertain whether the note had been paid, and, if paid the suit at law would have been enjoined. The dismissal of the bill was, therefore, an adjudication by the court that the note had not been paid.

THE CASE is stated in the opinion.

DURANT & HORNER for plaintiff.

H. O. & R. CLAUGHTON for defendants.

Mr. Justice JAMES delivered the opinion of the court :

This was a suit upon a promissory note to recover from the defendants a balance due upon it of \$1,441. About a month after the suit was instituted, David Pulman, one of the defendants, filed a bill on the equity side of this court for an account, &c., and also to enjoin the proceeding at law upon the ground that he had a complete defense in equity against any recovery upon the note. Shortly afterwards, and before the hearing of the equity suit, the defendants, in order that the suit at law might not go by default, filed a number of pleas to the action one of which was "payment." Before the trial of the case at law the equity suit for an injunction had proceeded to a final decree and the bill been dismissed. To meet the plea of "payment" the plaintiff offered in evidence the record and decree dismissing the bill and prayed the court to instruct the jury that this decree closed all defense as to any alleged payment on account of the note sued on. Which prayer the court refused to grant; and one of the questions

raised before us is whether this prayer should have been granted or not. We think that it should have been, and for these reasons it was disclosed on the trial that several persons had purchased from Stevens a tract of land lying back of the city of Alexandria, to be used as a brick yard, that some of these persons sold out to others, who, by special contract, were to take their places, and to make the same payments which they were bound to make. Mr. Pullman, the present defendant, by a written contract, took the place of one of these parties as to one-third of this purchase, agreeing to pay whatever that person, as his grantor, had agreed to pay. At the time of that purchase he made payment of \$1,734.

Now, if this is to be regarded as a payment upon the present note, he has not only paid the balance due upon it, but has largely overpaid it. It seems to have been deemed uncertain at the trial whether this payment of \$1,734 was not made in a prior note, for there were two promissory notes given. That question was before the court in the equity cause, and was necessarily adjudicated when the court dismissed the bill. This whole transaction was set out in that cause; it was there disclosed that Pullman was the successor of one of these parties, and that he was entitled to certain payments under his contract. He had, in a certain condition of the affairs of the partnership, a right to a salary of \$1,000 a year, and, by the terms of the same contract, he was entitled to have his share of the profits, which were in the hands of this plaintiff, credited on that note. In his bill, he did not rely on the payment of the \$1,734 as payment on this note at all, but set up as a defense to the present note, his character as an interested party, claiming to have his share of the profits which were retained. as has been stated, credited on the note. The decree of dismissal necessarily adjudicated all of these matters. A court of equity was asked to enjoin the collection of this note on the ground that certain credits should be allowed; the court had to look into the condition of the claim, and to ascertain how this \$1,734 was to be applied. That is to say, what it was a payment of. Having taken jurisdiction of the cause, they could not de-

termine whether certain credits would satisfy the note, without ascertaining the exact condition of the account. And, if this \$1,734 was to be a credit on this note, the court, having taken jurisdiction in the cause for reasons of equitable defense, would be obliged to apply this sum as a payment, and instead of dismissing the bill, enjoin the suit. The fact that they did not enjoin the suit adjudicates the question that the \$1,734 was not a payment on this note. Looking at the papers, we have satisfied ourselves entirely as to the true character of that payment. It is there fully explained that Pullman bought a one-third interest, and undertook to reimburse his vendor for what he had already paid, and to take his place. He had to make two payments, one to the vendor, of what he had laid out, and the other to make up what he was yet owing, for it appears that his vendor still owed on a prior note \$1,734, and that sum he paid on the part of his vendor (and the rest on his own behalf) paying it to the plaintiffs on account of the accruing debt of his vendor. It was thus not a payment to the plaintiff on his own account, but on the account of his vendor, and is not entitled to be treated as a credit on the present note. The court declined to instruct the jury that the decree of dismissal adjudicated this question. We think, however, that the record introduced between the same parties showed the fact that the court had adjudicated this question, that this present note had not been paid.

Judgment reversed, and case remanded for new trial.

THE CHARTER OAK LIFE INSURANCE CO.

vs.

A. A. HOSMER.

AT LAW. No. 19,408.

{ Decided December 5, 1881.

{ The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

1. On a certification to the General Term of a motion to quash a writ of *certiorari* in a Landlord and Tenant's proceeding, the court has no power to require the defendant to enter into an undertaking with surety to pay the intervening rent and damages occasioned by the delay in hearing the motion, and, as against the surety, between whom and the landlord there is no privity, such an undertaking is not supported by any consideration. Nor, is the surety estopped to set up the want of consideration, the instrument not being under seal and even if it were it is doubtful whether it would be good against him.
2. The presiding justice may certify a case to be heard in General Term, if he sees fit, against the remonstrance of all the parties, or he may refuse to make such certificate, though all the parties unite in asking it. It is a matter for his own discretion and there is no guide for action except his own sense of judicial propriety.
3. The provisions of rule 91 of this court apply only to appeals and cannot be extended to embrace a certified case.

THE CASE is stated in the opinion.

S. R. BOND for plaintiff:

The undertaking was voluntary and is valid whether required by statute or not. *Sooy vs. State*, 9 Vroom, 324; *United States vs. Bradley*, 10 Pet., 343; *United States vs. Hodson*, 10 Wall., 395; *United States vs. Linn*, 15 Pet., 290.

A *certiorari* is not a writ of right, but is discretionary with the court, 3 Abbott's *United States Dig.*, p. 247, sec. 19 and cases cited. 1 Bac. Abr., tit. *certiorari*, p. 558; 43 Pa. St. R., 372. And discretionary acts of the court are not subject to review.

If the court had the right to require security as a condition of granting the *certiorari*, it had the continuing right to require it during the pendency of the proceedings. It is one of the ordinary powers of the court.

The Revised Statutes of the District of Columbia, sec. 800, provides that the court in Special Term *may* order a motion, or suit not triable by jury, to be heard in the General Term in the first instance.

It was not an absolute right on the defendant's part to have the motion certified to the General Term. It was a favor and the undertaking was given voluntarily in order to secure the benefit of its being so certified, and defendant enjoyed thereby the possession of the premises in question. It would be unjust to hold that he is not liable to the plaintiff at whose expense he reaped the advantage. *Moore vs. Hodson*, 5 Mass., 314; *Thomas vs. White*, 12 Ib., 367; *Respublica vs. Lacaze*, 2 Call., 118; *Commonwealth vs. Wolbert*, 2 Binn., 292; *United States vs. Four Pieces Woollen Cloth*, 1 Paine, 435.

S. S. HENKLE and W. K. DUHAMEL for defendants.

Mr. Justice HAGNER delivered the opinion of the court :

In December, 1876, an action was commenced by the plaintiff, as landlord, before a justice of the peace to obtain possession of real estate from Henry H. and Lewis C. Tallmadge, tenants holding over. In January, 1877, before the decision of the justice, the tenants obtained a writ of *certiorari*, and the proceedings in this way were removed to the Circuit Court. In that court the plaintiff moved to quash the writ of *certiorari*, and after the argument of the motion had proceeded to some extent, the presiding justice, on the 3d of March, 1877, certified the motion to be heard by the General Term in the first instance. When this had been done the plaintiff suggested that its effect will be injurious to its interest, "since it would allow the tenants to remain in possession of the property until the decision by the General Term without any security for the payment of the rent ;" and the presiding justice, on application of the plaintiff, required the tenants to give bond to secure the plaintiff against such loss. The tenants, with the defendant Hosmer as surety, thereupon executed an undertaking in the following words :

“ In the Supreme Court of the District of Columbia.

“THE CHARTER OAK LIFE INSURANCE Co. }
 } *vs.*
HENRY H. & LEWIS C. TALLMADGE. }

“ On motion to quash Writ of Certiorari.

“Whereas the motion to quash the writ of *certiorari* in this case was ordered by the court at special term to be certified for hearing in the General Term of this court, and the defendants were ordered to give security for the payment of the intervening rents of the premises mentioned in the proceedings in the cause, and such damage as the plaintiff may sustain by the delay in the hearing of said motion by reason of its being so certified, in case it shall be decided by the court in General Term to sustain said motion. Now, therefore, we, the said Henry H. Tallmadge, Lewis C. Tallmadge and A. A. Hosmer, do hereby undertake and agree to pay unto the plaintiff, the Charter Oak Life Insurance Company, all intervening rents of said premises and all damages which it may sustain by reason of the delay in so certifying said motion to quash the writ of *certiorari* to the General Term in case said motion shall be sustained and the said writ quashed; but in case the court in General Term shall overrule said motion then this obligation shall be void.

“Witness our hands this 3d day of March, 1877.

“HENRY H. TALLMADGE.

“LEWIS C. TALLMADGE.

“A. A. HOSMER.”

The case was heard in the General Term, and the motion to quash was sustained on the 7th of January, 1878, and the plaintiff afterwards obtained possession of its property.

The present action is brought against the tenants and the defendant Hosmer, upon the undertaking above set forth to recover the amount of rent alleged to have been lost between the 3d day of March, 1877, and the 7th of January, 1878. The tenants were not summoned, and the present proceeding is against the defendant alone as surety on the undertaking.

The declaration contains two special counts ; one setting forth the undertaking at length, and the other alleging its purport, and claiming for the breach of the promise to make good the damages sustained by the plaintiff from the delay incident to the certifying of the case to the General Term ; it also contained the usual money counts. The defendant Hosmer demurred to the 1st and 2d counts ; there was joinder in demurrer, and the case in this form was also certified to the General Term, and is heard now in the first instance.

The right to recover in the action is denied by the defendant, upon the ground that the court below had no power to require the execution of such an undertaking, and therefore that no action can be sustained against the defendant upon it.

In our opinion the point is well taken.

It is admitted that there was no statutory provision authorizing the court to require security to be given where a case is certified to the Special Term in the first instance. The court below in making such certificate acts solely upon its own discretion, irrespective of the wishes of the parties litigant. The justice may certify the case to the General Term, if he sees fit, against the remonstrance of all parties, or he may refuse to make such certificate, though all the parties unite in asking it. There is no guide for his action in the premises, except his own sense of judicial propriety. We see no more warrant for the requirement of a bond to cover any losses that may result from delay in the hearing where a case is so certified, than where a case is simply continued from one day in the term to another, or from one term to another. It does not necessarily follow that any delay will result from certifying the case to the General Term. It may well be that the decision may be hastened by such certificate. In this case the plaintiff gained the case in the General Term ; and he probably obtained a final decision in his favor more promptly than he would have done if the court below had decided the case, and it had been brought to the General Term on appeal.

The authorities cited by the plaintiff's attorneys as to the obligation, as voluntary undertakings, of bonds informal for want of compliance with statutory requirements, have no application to this case. This is not a bond under seal, but is an undertaking in parol, exacted, as we have seen, without any statutory authority, or any general rule of the court to support it. The defendant, therefore, as surety, is not estopped to set up the want of consideration for the contract alleged in the declaration. There is no privity between himself and the plaintiff, and the declaration does not show upon its face a consideration legally sufficient to support a contract between the defendant and the plaintiff. That such an allegation should appear on the face of the declaration is a well-known rule of pleading. 1 Chitty, 293:

The act of the judge below in certifying the case did not constitute any consideration as against the defendant, who was a mere surety, and not originally in any manner indebted to the plaintiff, and who could not possibly be benefited or injured by the action of the justice in the premises. The provision of the Revised Statutes of the District of Columbia, section 800, is silent as to any power to exact an undertaking or bond, where the judge in his discretion sees fit to certify the case.

This section is the whole origin and foundation of the power to make such certificate; and as the court has no common law jurisdiction in the matter, it cannot, under the exercise of an implied power, require the execution of such an undertaking from either party when it sees fit to make such certificate of its own motion. 1 Black., 374, *Rice vs. Railroad*.

The undertaking seems to have been framed under rule 91 of this court. But it is obvious on its face that the rule only applies to appeals, and cannot be extended to embrace a certified case; and it has been decided by the General Term in *Bryan vs. Sanderson*, 3 MacArthur, 404, that under this rule, a bond is only required where the appeal is to operate as a supersedeas. But if this were a bond under seal, it is doubtful whether it would have been good against

the defendant. See *Tabor vs. United States* ; 1 Story's Reports, 5, *Greathouse vs. Dunlap*; 3 McLean, 30, *Benedict vs. Bray* 2 California, 225.

The ruling in *Motter vs. Primrose*, 23 Md., 484, approaches more nearly to the question before us than any case we have seen. There the lower court ordered a mandamus to issue against the defendants, commanding them as a board of managers to hold an election at a designated time. The defendants appealed from this judgment, as they were authorized to do by the Maryland law, which expressly declared that appeals in mandamus cases should be heard in preference to others in the court of appeals; and with the view that the appeal should operate as a supersedeas, they applied to the court to fix the penalty of the appeal bond they proposed to give. This the court below refused to do, upon the ground that the general law referring to the subject did not specially authorize an appeal bond to be given in mandamus cases. This decision was affirmed by the court of appeals, which held that no jurisdiction was committed to the circuit courts to require or approve a bond in mandamus cases, in the absence of an express provision of law.

It may well be that the result of certifying the motion to quash to the General Term has proved hurtful to the plaintiff, and that it might be reimbursed for its losses if this court could enforce a recovery upon the undertaking improvised by the court below. But since we are unable to find any authority in the court to require the undertaking, we must hold that there can be no recovery as against the defendant; and the demurrer is sustained.

SALLIE WALLINGSFORD

vs.

WILLIAM H. BENNETT.

AT LAW. No. 19,856.

{ Decided December 5, 1881.

{ The CHIEF JUSTICE and Justices WYLIE and JAMES sitting.

1. Section 797 of the Revised Statutes of the District of Columbia, exempting certain property of the head of a family or householder from execution, rests upon public policy. The statute was intended for the protection and preservation of the family notwithstanding the improvidence of its head, and an executory agreement to waive its benefits is inoperative and void.
2. In a landlord's proceeding by attachment before a magistrate, the return of that officer to a writ of *certiorari* showed that a writ of execution upon a judgment *in personam* (unappealed from) had issued against such of the goods and chattels of the defendant as were *not exempt from execution*. *Held*. That the question of the exempt character of the property, not appearing to have been adjudicated by the magistrate, might be raised in an action of replevin against the constable for seizing the goods.
3. Replevin against the officer will lie by the execution debtor when his exempt property has been levied on.

STATEMENT OF THE CASE.

This was an action of replevin brought by a defendant in execution to recover certain of her goods and chattels levied upon by a constable under a writ of execution issued by a justice of the peace of this District on a judgment rendered in a case of attachment for rent.

The facts of the case are as follows: On the 20th of March, 1878, the plaintiff, Sallie Wallingsford, a resident of the District and the head of a family, leased from Frank T. Browning, trustee, a dwelling house situated on Missouri avenue in this city. One of the clauses in the lease signed by Mrs. Wallingsford was as follows:

“And it is hereby further understood and agreed between the parties hereto, that said party of the second part shall, and does by these presents, waive, relinquish and release all her rights, benefits and advantages extended to her as tenant under and by virtue of a certain act of Congress, entitled ‘An act exempting certain property of debtors in the District of Columbia from levy, attachment or sale and execution,’ approved February , 1867.”

After having taken possession of the premises under the

lease, the plaintiff became indebted to her landlord for ninety dollars rent, and to enforce his lien for this rent upon such of the tenant's goods and chattels as were upon the premises, the landlord brought suit by attachment before a justice of the peace. The writ was issued on the 26th of July, 1878, and the property having been attached, Mrs. Wallingsford appeared and defended the suit. It does not appear whether she set up her exemption rights as a defense in this proceeding before the magistrate or whether that issue was tried by him. It does appear, however, that on the 1st of August, a judgment *in personam* for ninety dollars and costs, and condemnation of the goods attached was rendered against her. Upon that judgment there was issued a writ of execution, not *in rem* of the goods attached and condemned, but an ordinary writ of execution *in personam*, as follows:

"DISTRICT OF COLUMBIA,

" *County of Washington, ss.*

"You are hereby commanded, that of the goods and chattels, lands and tenements, rights and credits, *so far as the same are not exempted by law*, of Sallie Wallingsford, being in the County of Washington, you cause to be made as well the sum of ninety dollars certain debt, on interest from the first day of August, 1878, as the sum of twenty dollars and sixty-five cents (\$20.65), costs, which sums were recovered, &c., by a certain Frank T. Browning, trustee, against the said Sallie Wallingsford before C. S. Bundy, esq., one of the justices of the peace for the county aforesaid, on the first day of August, 1871, and that you lawfully account for those sums of money within twenty days from the date hereof, before me, the subscriber, and also all additional costs thereon.

"Hereof fail not at your peril, and have you then and there this writ.

"Given under my hand and seal, this 8th day of August, 1878.

[L. S.]

"C. S. BUNDY, J. P.

"To WILLIAM H. BENNETT, *Constable.*"

When the property in question was seized by the constable under this writ, Mrs. Wallingsford replevied it under a writ of replevin sued out of this court, at the same time filing with her declaration an affidavit as required by section 815 of the Revised Statutes of the District, stating:

First. That she was entitled to recover possession of the chattels proposed to be replevied, being the same described in the declaration.

Second. That the defendant has seized and detains the same.

Third. That the said chattels were not subject to such seizure or detention, and were not taken upon any writ of replevin.

A plea of not guilty was entered by the defendant constable and, issue having been joined, the case came up for trial before the court below on the following agreed statement of facts:

AGREED STATEMENT OF FACTS.

"It is hereby stipulated by and between counsel for the respective parties hereto, that the following case be stated for the opinion of the court in the nature of a special verdict.

"1. That the goods and chattels mentioned in the declaration filed in this case, were seized by the defendant, as the goods of the plaintiff, under and by virtue of a writ of execution issued by C. S. Bundy, Esq., a justice of the peace in and for the District of Columbia, on a judgment rendered in an attachment case for rent in a case then pending before said Bundy, wherein Frank T. Browning, trustee, was plaintiff, and Sallie Wallingsford, the plaintiff herein, was defendant, said writ of execution being directed to said defendant, who was then, and still is, a duly qualified constable in and for said District. That said writ of execution is now on file in the clerk's office of this court with other papers in the case of Frank T. Browning, Trustee, vs. Wallingsford, Law, No. 19,905, and is, together with all the papers in said cause, made a part of this statement. That though said writ of execution purports on its face to have been

issued on the 8th day of August, 1878, yet, in point of fact, it was not issued until the 9th day of August, 1878.

"2. That said goods, at the time of seizure as aforesaid, constituted the entire household furniture of the plaintiff, of the class mentioned in section 797 of the Revised Statutes, and did not exceed the sum of three hundred dollars in value. And the plaintiff herein, at the time of said seizure, was, and still is, a head of a family or householder, and a resident of the District of Columbia.

"3. That the lease on file in case No. 19,905 at law, aforementioned, was signed by the plaintiff therein, and is the lease under which the plaintiff herein occupied the premises upon which said goods and chattels were seized by said defendant, which said lease was used as evidence before said Bundy at the trial had before him, and at which trial judgment on said attachment was rendered, and the said execution issued, which said lease is made a part of this statement.

"4. That at the said attachment trial had before said Bundy, the plaintiff herein appeared, with counsel, and contested against a judgment being rendered on said attachment.

"5. Judgment to be entered for the plaintiff or defendant as the court may deem lawful under the above state of facts, the costs to follow the judgment, and both parties herein reserving the right of appeal, and of any other remedy at law or equity, the same as if the said judgment had been regularly entered upon the verdict of a jury."

The court below rendered judgment for the plaintiff, from which the defendant appealed.

FRANK T. BROWNING for appellant :

In the first place it has been laid down as a proposition of law that replevin will not lie to take goods out of the custody of the law. Evans' Practice, p. 46, Cromwell vs. Owings, 7 Har. and Johns., 55.

The correctness of this principle has been disputed and authorities against it are extant, but it may be safely said that the *execution debtor* cannot replevy goods out of the custody of

the law. 2 Gr. Ev., 615 ; Ringgold *vs.* Williamson, 4 Co., 89 ; Taylor *vs.* Carryl, 20 How., U. S., 595 ; Freeman *vs.* Howe, 24 How., U. S., 456.

It is claimed, however, that since the statute of exemption the law is different, and that the execution debtor may replevy exempt property, but on an examination of the authorities it will be seen that in those States in which that doctrine is held it is under construction of the statute. In Pennsylvania, Kentucky and Illinois it has been held that replevin is not the proper remedy for a disregard of a claim under exemptions. Bonsell *vs.* Cowley, 8 Wr., 442 ; Hammer *vs.* Fresi, 7 Harris, 253 ; 60 Ill., 380 ; and see Herman on Execution, §173 ; 4 Cush., 85 ; 7 Vt., 465, and Reynolds *vs.* Sallie, 2 B. Mon., 18.

Again, in the present case the plaintiff waived her exemptions. The authorities cited to support the position that this waiver was inoperative, will be found to be based on statutes. On the other hand the authorities are abundant that the exemption being a statutory privilege which the debtor alone can avail himself of, he may, if he elects, waive it. Wells on Replevin, §270 ; Bowman v. Sunley, 21 Pa., 225 ; Lines' Appeal, 2 Grant's Cases, 197 ; Smiley *vs.* Bowman, 3 Grant's Cases, 132 ; McCaffrey *vs.* Wooden, 65 N.Y., 459

But again, exemptions cannot be claimed, when an execution is levied on an attachment, after judgment and order of sale. Herman on Executions, §98 ; State *vs.* Manley, 15 Ind., 8 ; Perkins *vs.* Bragg, 29 Ind., 507 ; 15 Ind., 49.

Finally, this question as to the plaintiff's right of exemptions is *res adjudicata*, for that question was in issue in the attachment case, and adjudged against the plaintiff herein and that decision is binding and could not be inquired into in this action. Freeman *vs.* Howe, 24 How., U. S., 457 ; Perkins *vs.* Bragg, 29 Ind., 507.

FRANKLIN H. MACKEY for appellee :

An agreement to waive the benefit of the exemption law is not binding. So decided by the courts of last resort of the following States :

New York : *Kneetle vs. Newcombe*, 22 N. Y., 249 ; *Crawford vs. Lockwood*, 9 How., N. Y. Prac.

Tennessee : *Denny vs. White*, 2 Cald., 283.

Wisconsin : *Maxwell vs. Reed*, 7 Wis., 583.

Iowa : *Curtis vs. O'Brien*, 20 Iowa, 376.

Kentucky : *Moxley vs. Regan*, 10 Bush., 156.

Texas : *Ross vs. Lister*, 14 Texas, 469.

Louisiana : *Levicks vs. Kuen*, 9 Am. Law Reg., 112.

Indiana : *Eltzroth vs. Webster*, 15 Ind., 21.

By the authority of the foregoing cases the law upon this subject may be stated as follows :

1. That a waiver *in futuro* of the benefit of any law passes no right.

2. That the right given by the Statute of Exemptions to the *head of a family* is as much for the benefit of the other members of the family as himself, and that he has no power to waive *for them* this right.

3. That waivers of exemption laws are against public policy.

4. That, independently of this particular policy, it is not within the power of parties to give by their contracts any other effect to judgments and executions than that which the law attributes.

I have been unable to find any case which has decided that where the benefit of the exemption law is given to the *head of a family*, he may waive, by an *executory* agreement, the benefit of that law.

As to the remedy : it is not disputed that trespass *d. b. a.* would lie in this case ; indeed we are directed to that action as the proper remedy. But the authorities are almost as numerous as the books of reports themselves that replevin will lie wherever trespass *de bonis asportatis* will lie. Cr. C. C. 39, 20 Johns, 465 ; 7 Johns, 140 ; 1 Wend., 109 ; 8 Zab., 170 ; 12 Wend., 39 ; 6 Halst., 370 ; 23 Me., 196 ; 4 Mo., 93 ; 1 Eng. R., (Ark.) 21 ; and the numerous old common law authorities cited in those cases.

It is settled in this District by the decision in *Ringgold vs. Williamson*, 4 Cr. C. C., 39, that replevin will lie where

the goods of a party not the execution debtor have been taken in execution. That case was decided before the passage of the exemption laws, and every argument used there to sustain the right of a third party to replevy his goods when taken under execution against another, applies with equal force since the enactment of this beneficent statute to the case of a debtor in execution whose exempt property has been levied upon. In both cases the officer takes goods for which the writ gives no authority: "There cannot, we think," said the court in *Williams vs. Miller*, 16 Conn., 147, "be any difference in the law applicable to the levy of an execution on property exempt from such levy, and a levy on the property of a third person, not the execution debtor; we can discover no difference in the principle that should apply to the two cases." See also *Wells on Replevin*, sections 245, 248 and *Wash. Law Rep.*, Vol. VIII, No. 48.

The point raised by the defendant that the question of the exempt character of the property was finally adjudicated upon the trial before the magistrate, and cannot be raised here in this action, is sufficiently answered by the fact that such adjudication by the magistrate is not shown by anything in the record.

THE CHIEF-JUSTICE, after stating the case as above, delivered the opinion of the court.

In examining the questions of law presented in this case we will consider:

First. Whether an agreement to waive the benefit of the exemption law is binding.

Second. Whether the judgment, unappealed from, rendered by the magistrate in the attachment proceeding, in which the question of the exempt character of the property could have been raised, operates as such a final adjudication of that question as to prevent its being considered here.

Third. Whether an action of replevin will lie by a debtor in execution against the officer serving the writ, when the debtor's exempt property has been seized by him.

Section 797 of the Revised Statutes of the District of Columbia, provides that certain "property, being the prop-

erty of the head of a family or householder shall be exempt from distraint, attachment, levy and sale on execution or decree of any court in the District."

It is claimed by the defendant that this statute, exempting property from execution, creates in the plaintiff merely a privilege to be exercised for his benefit, or waived in the interest of the defendant, at his option, and that the stipulation in the lease, viz.: "And it is hereby further understood and agreed between the parties hereto, that said party of the second party shall, and does by these presents waive, relinquish and release all her rights, benefits and advantages extended to her as tenant under, and by virtue of a certain act of Congress, entitled, 'An act exempting certain property of debtors in the District of Columbia from levy, attachment or sale, and execution, approved February 5th, 1867,' " constitutes such waiver.

On the other hand, it is urged by the plaintiff that the exemption provided by the statute, is an injunction in the interest of public economy, and beyond the contract control of the parties to an executory agreement. Over this question, courts have divided and authorities conflict. Most of the authorities justifying the power of the parties to supersede the law by express contract, antedate the history of the laws exempting property from execution, and ignore, as we think, the tone, spirit and public purpose of the law. If the legislature had not intended this law to be observed in the interest of the public welfare, it never would have been enacted, and parties would have been left where the law found them, to exercise their personal discretion in the disposition of the subject by contract. The objective purpose and provision of the law is the household and the family, and the necessities and conveniences of the family community, as an important if not the most important integral element of the State. Evidently the law maker had the preservation of the integrity of the family as the chief purpose; the law maker was providing against its dispersion and extinction, seeking to protect families and communities from vagrancy, poor-houses and prisons, recognizing the im-

portant fact that industries, economies and public order, take root in the family. Yet it is evident from the nature of the statute and the subject it treats of, that the legislature was not making law for the benefit or to the prejudice of the head of a family, but a law for the protection and preservation of the family, notwithstanding the improvidence of its head. This view of the office of this law is strengthened by the provision of section 798. The leading case in support of the view that the statute under consideration is a statute in the public interest, and may not be superseded by the executory contract of the head of a family, is found in the 22d N. Y. Rep., *Kneetle vs. Newcomb et al.*, p. 249, the unanimous decision of the court of appeals of that State delivered when that court was in its best state. I refer to it not only as high authority in itself, but for the exhaustive and unanswerable reasons of Judge Denio, delivering the opinion which I adopt as my own. If correct in this view, the stipulation in the lease subjecting the property to execution is against public policy and void. This view of the question is supported by the highest courts of the States of Wisconsin, Tennessee, Iowa, Kentucky, Texas, Louisiana and Indiana.

It is urged again that the plaintiff cannot sustain the action and avail herself of the exemption laws, for the reason that by the judgment of the magistrate in the attachment suit, this question was finally adjudicated and may not be revived or reviewed here. If the premises are correct the conclusion follows. Unfortunately for the enlightenment of the question, the issues tried by the magistrate do not find explanation in the record. His judicial inquiry is conducted without pleading, which, in this court, would define the issues heard and determined and which would enlighten judgment here. We are, therefore, left to inference as to what was decided in detail, from what was expressly determined in result. What the court did was to render a judgment of condemnation of the property attached, and a judgment *in personam* for ninety dollars and costs, and as an interpretation of what he had done, sent out an execu-

tion against the goods and chattels of the defendant *not exempt from execution*. In the absence of any other explanation of what was determined in fact, the issue made here was not determined there. Our province here in this behalf is to find out what was done, rather than what ought to have been done. This rule is the only safe one, especially when brought into application to inferior courts not of record.

This disposition of the two questions already considered brings us to the consideration of the only remaining question in this case, namely, is the process of replevin available to the plaintiff, who is also the defendant in the execution under which the property was taken? In resolving this question, we are invited to an examination of the statute, section 815, of the Revised Statutes of the District, providing that a writ of replevin as a remedial process can only issue upon the authority of the affidavit of the plaintiff, his agent, or attorney. The third clause of the same section also provides that it shall appear by the affidavit upon which its issuance is predicated, "that the chattels were not subject to such seizure or detention, and were not taken upon a writ of replevin."

This statute declaring the necessity and defining the substance of the affidavit declares and defines the functions of the writ in this respect. It cannot issue to recover the possession of property subject to seizure on execution, or property in the custody of a writ of replevin. From the language of these statutes we are left to conclude that the writ of replevin may be employed in all other cases relating to pre-existing process. Was this property subject to seizure upon execution? Section 797, before referred to enlightened by the agreed facts in this case, makes it conclusive that it was not subject to seizure. It is not pretended that it was taken by virtue of a writ of replevin. The statute is decisive of the question, and the argument might close here, but it is seriously claimed by counsel that, although exempt from levy, it was, nevertheless, taken in execution, and thereby transferred to the custody of the law. That to disturb this

custody of the law, would be in contempt of the writ of execution, and the judicial authority of the court that issued it, demoralizing the authority of the court and the integrity of the writ. To my mind this involves a misconception of the rule invoked to defeat the appropriate powers of the writ of replevin. The rule insisted upon contemplates a case where the property is within the scope and power of the execution, and where the remedy for the abuse of the power and process may be obtained in the forum issuing the writ. In the case before us, under the express limitations of the execution, the defendant was authorized to levy upon goods and chattels of the plaintiff *not exempt from execution*. As is shown by the agreed statement of facts, the property in controversy was exempt from execution and not within the mandate of his writ, thus fixing upon the officer, defendant, the contempt of his process and its authority, instead of the plaintiff. The law does not acquire possession of property by trespass or wrong, and it is no infraction of its dignity to surrender property that may have strayed into the keeping of its officers without authority of its process. To hold any other view would be to hold that the injured party was without adequate remedy. It is no sufficient answer that the plaintiff may have redress by the action of trespass, or by bill in chancery. While such remedies are being discussed in the courts, the family is despoiled of the possession and use of the essential means which the law has provided for its preservation and comfort.

The judgment below is affirmed.

THE DISTRICT OF COLUMBIA

v.

THE BALTIMORE & POTOMAC R. R. Co.

AT LAW. . No. 16,783.

{ Decided DEC. 30, 1881.

{ The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

1. Where a municipality is mulcted in damages for injuries received by a party in falling into an excavation made by a railroad company in one of its streets, the latter is liable over for the amount paid.
2. Where a party liable over has been duly vouched to appear and defend the suit, but fails to do so, he is bound by the facts which must have been found by the jury to justify their verdict, and he will not be permitted to show the contrary in an action over against him.
3. A municipality charged with the duty and power to grade and alter the streets of its city is not answerable, in the performance of such work, for injury resulting to a citizen, unless negligence be shown.
4. But it is otherwise with a private corporation, who is liable like any other private person making a specially authorized but extraordinary use of a public street.
5. Such uses of public streets by private persons are lawful only because specially authorized, and while so conducted as to be harmless to others, but they become trespasses whenever injury occurs, whether resulting from negligence or not.
6. Evidence, therefore, by such a defendant to show all possible care and diligence if unaccompanied by any assertion of responsibility on the part of another, or of want of care on the part of the person injured, should be excluded as immaterial to the issue.
7. The fact that a municipality grants to a private person the right to engage in extraordinary work upon its streets does not deprive the municipality of the right to recover over against such person the amount which it (the municipality) has been compelled to pay to a citizen injured by reason of such work.
8. Nor will the fact that the action was brought by the injured party against the municipality instead of directly against the person engaged in such work enable the latter, in an action over against it, to set up absence of negligence as a defence on the ground that the municipality granted permission to do the work. The effect of such a grant being only to prevent the grantee from being a trespasser in the bare act of breaking up the street; but it gives no exemption from liability for injury resulting to others in the execution of the work.
9. As stated in the exception, the defendant's offer was "to prove that the defendant company *was under no obligation* to erect barricades."
- Held*, That, as so stated, this was simply an offer to establish by evidence before the jury a proposition of law as to the defendant's liability and was properly rejected.
10. It seems that when a party has been compelled by the default of another (who was primarily liable) to pay damages for injuries received, he may recover in an action over, the entire amount paid, with interest and costs of both suits.

THE CASE is stated in the opinion.

RIDDLE AND MILLER for plaintiff.

ENOCH TOTTEN for defendant.

Mr. Justice **HAGNER** delivered the opinion of the court.

In 1873, William Barnes recovered a judgment against the District of Columbia for \$3,500 and costs, for injuries sustained by him in falling into an unguarded excavation in K street, in the city of Washington. This judgment was affirmed by the Supreme Court of the United States, and in April, 1876, the District authorities paid to Barnes the amount of the judgment, with \$652.26 for interest, and \$173.09 costs of suit.

In November, 1876, the District of Columbia brought the present suit to recover from the railroad company the sum thus paid to Barnes.

The declaration recites the former recovery against the District, and charges in substance that the excavation into which Barnes fell was made by the railroad company in constructing a tunnel for their railroad along K street; that it was the duty of the company to guard the work so as to secure persons passing from accident by reason of the excavation, and that Barnes fell into it and was injured because the railroad company had left it open and unprotected. It avers a promise and undertaking on the part of the company to repay the money which the District had been compelled to pay in discharge of the judgment, and contains the common counts for money paid, &c.

The verdict was for the District, and the railroad company brings the case here on an exception which presents for examination several rulings of the judge below.

First. At the trial of the present case, the District offered in evidence the pleadings and judgment in the Barnes case, and proceeded to show the payment of the judgment by the District; that Barnes received the injury by falling into the excavation made for the tunnel; and that before the trial of the Barnes case, notice was served upon the proper officers of the railroad company, requiring and requesting the com-

pany to appear and defend the suit. And the District of Columbia there rested.

The railroad company thereupon, says the exception, asked the court to "decide that neither privity nor the relation of superior and inferior existed between the B. & P. R. R. Company and the District of Columbia as to the matters and things involved in this action, and that this action could not be maintained against the said company upon the pleadings and facts in the case. But the court refused to declare the law as requested and held and decided that the railroad company was liable in this suit upon the state of facts. To which ruling an exception was noted at the time."

Assuming that this ruling is properly before us, we see no reason to doubt that the court was right in refusing "*to decide*," as requested by the railroad company. The question of "superior and inferior," is in no degree involved in the present inquiry. There was no pretense that the railroad company had been employed by the municipality to execute the work, and was thus only the servant of the District in its performance. Nor, on the other hand, was it contended that the railroad company, by any form of agreement, had shifted its liability in the premises upon any contractor who had by stipulation or effect of law become answerable in its stead. And even if the latter position had been assumed, it would have been untenable.

In the cases of *Chicago vs. Robbins*, 2 Black, and *Robbins vs. Chicago*, 4 Wall., 670, it appeared that a lot owner had employed a contractor to erect a large building; that in the course of its erection an area was excavated in the sidewalk into which there fell a foot passenger who recovered damages against the city, which in turn sought to recover from the lot owner, Robbins, the amount of the judgment. Robbins distinctly relied upon the nature of the contract as exonerating him and fixing the liability upon his contractor. But the Supreme Court in the case in 2 Black, 427, say that, without disputing the doctrine of *respondeat superior* as an abstract proposition, they "cannot see that it is applicable to this case." "This area when it was begun was a lawful work,

and, if properly cared for, it would always have been lawful ; but it was suffered to remain uncovered, and thereby became a nuisance, and the owner of the lot, for whose benefit it is made, is responsible. He cannot escape liability by letting out work like this to a contractor and shift responsibility on to him, if an accident occurs."

What was "held and decided" by the court below, after refusing the defendant's request, appears to be within the terms in which the liability of a municipality in a case like the present, has been correctly stated.

In 4 Wall., 672, Mr. Justice Clifford uses this language: "Preliminary to that part of the charge which is the subject of complaint, the court remarked that although municipal corporations were primarily liable for injuries occasioned by obstructions or defects in their streets or sidewalks, they yet might have a remedy over against the party who was in fault and who had so used the street or sidewalk as to produce the injury. Instruction was then given to the effect that if the defendant knew that the suit was pending and could have defended it, and it was through his fault that the party was injured, he was concluded by the judgment recovered against the corporation. Express notice, said the presiding justice, was not required, nor was it necessary that the officers of the corporation should have notified him that they would look to him for indemnity. Just exception certainly cannot be taken to those instructions, as they are in precise accordance with what this court decided in this case when it was before the court on the former occasion."

Second. The defendant then made several offers of evidence, all of which were excluded, and we are asked to decide upon the propriety of its exclusion.

1st. The railroad company offered evidence "tending to show that the work of the construction of the tunnel had been done in a skillful manner, and that every reasonable precaution had been used, and every care taken by the said railroad company and its officers and agents to prevent accidents to persons and property;" "that the excavation was kept well barricaded and protected;" and "that, in fact, the

defendant corporation and its agents, servants and workmen exercised all the care, skill and prudence possible under the circumstances to prevent accidents during the progress of the work."

In our opinion this testimony was properly rejected. Its purpose was to show to the jury an absence of negligence on the part of the railroad company, as evinced by the exercise of all possible care on the part of its servants in the construction of the tunnel.

But this very point had already been conclusively settled against the company in the previous suit which the railroad company had been duly vouched to appear to and defend.

There could have been no recovery against the District in the Barnes suit, except upon the distinct proof of negligence, since a municipality charged with the duty and power to grade and alter the streets of a city is not answerable for injury resulting to a citizen in the performance of such work, unless it be shown that its agents were guilty of negligence in the discharge of this public duty. Barnes accordingly charged expressly in his declaration that the District authorities permitted and allowed K street between 6th and 7th streets s. e., to remain in a dangerous and unsafe condition, not barricaded, and without light or other signal to give warning to the wayfarer of the deep and dangerous excavation in the street, and that in consequence of such their gross negligence, the plaintiff fell into the opening and sustained the injuries complained of.

The excavation described was that made by the railroad company in the construction of their tunnel. With this work the city government had nothing whatever to do. The company alone were constructing it, and it was incumbent upon them to guard it and prevent its becoming a nuisance by being unprotected, at their peril. If the company had properly barricaded it, or warned persons off by proper lights, no accident could have happened, no negligence could have been established against the city, and there could have been no recovery against it.

The question of negligence was the cardinal all-important

point for the determination of that jury, and the railroad company was solicited to appear at that trial and show, if it could, that it had placed proper guards or barricades at the spot, or proper signal lights to give warning of the danger. After full notice "it kept silent when it should have spoken, and it cannot now be allowed to speak when it should keep silent." The verdict of the jury was a distinct finding of negligence on the part of the railroad company, the author of the nuisance, and was therefore a formal determination that the company did not exercise proper care in conducting and guarding the work, and that the injury resulted from their fault; "and if it was through his (its) fault that the party was injured he (the company) was concluded by the judgment recovered against the corporation." 4 Wall., 672.

If the company had been a formal co-defendant to the Barnes case, it could not be contended that the verdict would not have been conclusive against it on this point, and such was effectively its position after notice to appear and defend the suit.

"Persons notified of the pendency of a suit in which they are directly interested, must exercise reasonable diligence in protecting their interests, and if, instead of doing so, they wilfully shut their eyes to the means of knowledge which they know are at hand to enable them to act efficiently, they cannot subsequently be allowed to turn round and evade the consequences which their own conduct and negligence have superinduced." 4 Wall., 674.

Without going further in the expression of an opinion as to the extent to which the judgment of Barnes *vs.* The District is conclusive against the defendant, than is now required, we do not doubt that it must be held to have such effect at least to the extent spoken of in 10 Gray, 496, *City of Boston vs. Worthington*: "The judgment recovered by Southwick against these defendants is therefore conclusive against them on three points—that the highway in Congress square was defective; that Southwick was injured there while using due care, and that he suffered to the extent of \$10,000." This was a case where the party sued over by

the city defended upon the ground that he was only the lessee of the premises, and as such was not bound to keep up a railing about the cellar door.

The offer we are examining in the case at bar was unembarrassed by any such considerations, since it was not suggested therein that Barnes was not exercising proper caution—that the company did not, *alone*, make the excavation, or that, if any negligence existed it was not solely the negligence of the company.

2d. But we are further of the opinion, since the sole purpose of the offer was to show that the defendant company was not guilty of negligence, (unaccompanied by any claim of responsibility on the part of others for that negligence, if any existed, or of want of due care on the part of the person injured), the evidence might well have been excluded upon the further ground of its *immateriality* to the issue.

The defendant is not a municipality, a department of the governing power, but it simply occupies the position of any private person making an extraordinary use of a public street, engaged in a work which is lawful only because specially authorized, and while so conducted as to be harmless to others, but which becomes a trespass whenever injury occurs, *whether it result from negligence or not*. The rule is otherwise, as we have seen, with respect to a municipality; but in a trial by the injured party against this private corporation, the question of its negligence is not involved, and it would not be excused from responsibility merely by showing an absence of negligence. The law governing this question is well expounded in *Baltimore & Potomac R. R. Co. vs. Reaney*, 42 Md., 131. In that case the present defendant, under the authority of its charter, and of an ordinance of the city government, constructed a tunnel under the bed of Wilson street, in Baltimore city. The plaintiff sued to recover damages to his house caused by the excavation of the street, which, as he alleged, weakened the foundation of an adjoining house, near the tunnel, connected with the wall of the plaintiff's house by iron girders, and caused a settling which cracked the walls and otherwise injured the house.

As the Maryland charter then invoked by the company is identical with that now relied on, and the ordinance of the city of Baltimore closely resembles that passed by the authorities of the District of Columbia, the decision of the court of last resort in Maryland upon the defenses then urged by the company is entitled to especial weight, apart from the learning of the court and the evident good sense of the reasoning.

The court says : "The appellants having authority to construct the tunnel, they contend that any damage the appellee may have suffered to his house, by reason of the excavation of the street, is *damnum absque injuria*, and that no right of recovery exists, unless it be shown that the power delegated to the appellants has been illegally or negligently exercised. To this, however, we do not assent.

"In this case, the jury have found that the property of the appellee has been injured to the extent of \$3,000, and it would be a reproach to the law if the courts were required to determine that it was a case of *damnum absque injuria*, that there was no redress for such a wrong.

"As against a *municipal* government, in the careful exercise of its right and power to grade, change and improve the street, there could be no cause of action for any unavoidable injury done ; but as against the appellants, a private corporation in nowise connected with the municipal government, obtaining authority to use the streets in an extraordinary manner for its own private purposes and profit, the case is quite different. As against such party, the owner of a plot of ground, with a building thereon, bounding on a street, is entitled to the natural support which the bed of the street may afford to the foundation of his house. And notwithstanding authority may have been obtained both from the city and State legislature to make the extraordinary use of the street, yet that authority must be exercised at the peril of the party to whom it is delegated ; and if any injury accrues to private property in the exercise of the power, the party producing it must be held liable. If, as we have seen, the injury be produced by the careless or negli-

gent exercise of the authority, then there can be no question of the liability ; but if due care be exercised, and the injury is the natural and inevitable result or consequence of the doing the act authorized to be done, then, in a case like the present, the party doing the act and producing the injury must indemnify the sufferer. That there was no negligence or want of care in doing the work, is no answer in a case like this.

“That the excavation of the street for the tunnel was lawful and done in a lawful manner at the time, can constitute no defense to this action, if damages actually resulted from the work. There are many cases in which an act may be perfectly lawful in itself, and will continue to be so, until damage has been done to the property or person of another ; but ‘from the moment such damage arises, the act becomes unlawful, and an action is maintainable for the injury. This is the case where a man sinks mines and makes excavations in his own land, doing no damage in the first instance to his neighbor, but subsequently causing his neighbor’s land or his house to slide down into the excavation.’”

And the court proceeds at length to justify its position by reference to adjudged English cases of authority, fully sustaining the opinion.

The rights of private individuals are not to be sacrificed needlessly to an act of incorporation. To the sufferer it is unimportant whether his property or his person has been injured by one or more persons acting in their individual capacity, or by the same persons carrying on a similar business under a corporate name, which the legislature, at their own solicitation, has allowed them to adopt solely for their private advantage. A railroad may perfectly well be built and used by a single individual, as was the case with the earliest railroads in England, and probably is the case in some instances there and in this country at the present time. It was competent for Congress to empower a single individual to excavate K street for the construction of a tunnel for a railroad. That permission would give the individual authority to make the requisite excavations, so that he could not be

considered a trespasser so long as no injury resulted to others ; but every step in his work would be taken at his peril, and he would be answerable for whatever injury any one else might sustain from the exercise of his privilege, whether he used care and caution or not. Such franchises must be exercised in subordination to the prior existing rights of the citizen. For it cannot be imagined that any legislative body would attempt the enormity of granting such a privilege to one citizen, in utter contempt of the existing personal rights of others, equally deserving of protection, even if it possessed the power to do so. And what Congress would be incompetent to grant to a single individual or to several unincorporated, it would be equally powerless to commit to the same or other individuals trading under a corporate title.

In 2 Dillon on Municipal Corporations (3d ed.), § 1032, the position is thus stated : "No person, not even the adjoining owner, whether the fee of the street be in himself or in the public, has the right to any act which renders the use of the street hazardous or less secure than it was left by the municipal authorities. Whoever does so, whether by excavations made on the sidewalk by the abutter, or by unsafe hatchways left therein, or by opening or leaving open an area way in the pavement, or by undermining the street or sidewalk, or by placing unauthorized obstructions thereon, which makes the use of the street unsafe or less secure, is guilty of a nuisance and is liable to any person, who, using due care, sustains any special injury therefrom ; and in such cases the person who created or continues the nuisance is thus liable, irrespective of the question of negligence on his part."

The principle finds its support in the maxim "*sic utere tuo ut non alienum lædas*." One may have a clear right to the enjoyment of his property and yet may be responsible to those injured by its use, notwithstanding he may have exercised all care to prevent injury. If injury results, why should an innocent third party bear it ? In the case of *Scott vs. Bay*, 3 Md., 445, an action was brought to re-

cover damages resulting to neighboring property from the working of a stone quarry. The court below was asked to instruct the jury "that the defendant had the right to quarry stone from his quarries, and that the plaintiff cannot recover for any injury he may have sustained in consequence of such quarrying, if the jury believe the proper precautions were used in working the quarries, and that the injury was sustained without default of the defendant." The appellate court says: "If proper precaution had been taken they would still constitute no vindication of the defendant for the injuries resulting to the plaintiff." "It is a rule of the common law that a man should so use his own property as not to hurt or injure another, and, therefore, if he carry on a lawful trade or business in such a manner as to prove a nuisance to his neighbor, he must answer in damages. There are many cases in the books where this doctrine is applied, and among the number are those where a man erects a smith's forge, swine sty, lime kiln, tallow furnace, machine shop, quarry or privy so near the dwelling of another as to render it unfit for occupation." In *Rylands vs. Fletcher*, 3 L. R. Ho. of Lord, 330, the court say: "When one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer." He is bound *sic uti suo ut non lædat alienum*.

It would have been scant comfort to the sufferer in the Barnes case to be assured that the excavation into which he fell, and by reason of which he may have been rendered a cripple for life, was made with due care. The danger arose from the very nature of the improvement, which necessarily rendered the street unfit for night travel; yet the defendant assumed the risks of its construction.

In 45 Md., 135, *Lawson vs. Price*, the action was for obstructing plaintiff's millrace. The defendant's first prayer asserted his lawful right to clear his own land, and asked an instruction to the jury that if, in exercising this lawful right, the defendant was not guilty of negligence in cutting timber and clearing the land, the plaintiff was not entitled to

recover, although by reason of such cutting and clearing, timber or brush fell into the millrace to the damage of the plaintiff. The appellate court says : " The first prayer was properly refused. It sought to make the appellee's right to recover depend upon the existence of negligence on the part of the appellant. The action was for obstructing the appellee's mill-race by throwing or placing therein, or by cutting and allowing to fall therein, trees, logs, chips, branches, &c., whereby damage accrued to the appellee. The question in such case is not whether the appellant has acted with due care, but whether his acts have occasioned the damage complained of. If the acts complained of were done by the appellant, or by his agent or servant in the course of their employment, they were unlawful invasions of the appellee's right of property, and it matters not that they were done without negligence. Negligence is not the gravamen of the action."

So in the present case. The infliction of the injury shows that the excavation was left in a dangerous condition. The party making it, therefore, was a trespasser, and he should no more be allowed to defend himself by leading off the plaintiff into an examination of his want of negligence in committing the trespass, than to insist, if sued for a trespass upon another's close, that he ploughed his neighbor's land or cut down his shade trees with due circumspection and care. By the direct consequences of his act he inflicted injury upon another, and the law cannot be so unjust as to exonerate him upon the plea that when he destroyed another's rights he did so without negligence.

3. Does the fact that the company was authorized by law to construct the tunnel render this principle inapplicable?

In our opinion that circumstance can have no such effect.

The legislative permission authorized the defendant to make an extraordinary use of the highway in derogation of the common right of use. It was thereby exonerated from an action by the city, as a trespasser, *ab initio*, for the bare disturbance of the bed of the street, which would lie, in the absence of such authorization, without proof of special damage.

But when the legislature by giving the permission, waived this right of action, it did not design to waive or impair the right of action against the company in respect of actual injury sustained by a citizen from the excavation of the street. Nor could it agree that the citizen might receive such injury with impunity and be powerless to obtain redress by appeal to the courts, provided only the company could show that it availed itself of the unusual and hazardous privilege without actual negligence.

The authorization by the city, while simply estopping itself from contending that the bare act of breaking up the street should thereafter constitute the company a trespasser, could not and did not place the company in a more favorable situation, in this respect, than was occupied by the quarry owner or the farmer in the cases cited. Without any grant or legislative permission they had, in their quality of *owners* the right to quarry their own stone, and cut their own timber on their own land without being regarded as trespassers. And yet they were held justly liable for injury to their neighbors, arising in the prosecution of these lawful rights, notwithstanding the proof of absence of all negligence in their exercise.

So this company, after the legislative permission, had the right to break up the bed of that street, and as long as no special injury occurred to others, it could not be regarded as a trespasser. But when such injury had been caused, it became justly liable, as the quarryman and farmer were held to be, notwithstanding it might show an absence of all negligence in the construction of the tunnel thus authorized by the legislature.

In *Robbins vs. Chicago*, 4 Wall., 676, it was insisted that as Robbins in constructing the area acted under the express orders of the corporation, which by ordinance had required the raising of the grade, he could not be held liable at the suit of the city. "His authority to raise the sidewalk to the new grade," says the court, "is not contested." It proceeds; "Liability of the defendant, however, was not placed upon the ground that he was not authorized to raise the sidewalk.

On the contrary, the jury were distinctly told that the gravamen of the charge was not that the defendant was engaged in an unlawful work when he constructed the area; but the court placed his liability upon the ground that he left the area open and without guard to warn those who had occasion to pass in the street, so that the work which was originally lawful became a nuisance, and was unlawful at the time of the injury. Correctness of that instruction in view of the evidence as reported in the transcript is so manifest that it needs no support."

The assent of Chicago that Robbins should make the improvement was as full as that of the District of Columbia to the construction of the tunnel, but it gave no exemption from responsibility for actual injury caused in the execution of the work.

The present action is not brought directly by the injured party against the company, but by the District of Columbia seeking reimbursement for what it has been compelled to pay to Barnes. Does this circumstance change the principle we have been endeavoring to enforce so that the company can exonerate itself by showing absence of negligence?

It cannot be imagined that the District government when it authorized the company to make the tunnel with all proper care and precautions, could have designed to abandon or weaken its claim for reimbursement for whatever damages it might be compelled to pay for injuries caused by the excavation. The municipality would unquestionably have refused its assent to the permission asked, if it had been advised at the time, that if it should thereafter be compelled to seek by suit reimbursement for the bare amount of a verdict rendered years before (excluding the various charges inevitably attending such a recovery) it would be obliged to enter into a contest with the company and its servants in respect of a defense which would not have been tolerated in a suit brought by the injured party against the company, while the facts were fresh and the entire evidence accessible. There can be no reason why such testimony should be excluded in the one case and admitted in the other, and, indeed, it would appear

more unreasonable to allow it to be urged against the municipality, whose bounty bestowed the original privilege which the recipient abused to the great expense and cost of the city, than to admit it against an action brought by the individual whose ill-fortune had occasioned so much trouble.

If an individual or a corporation, conceiving that the grant of the coveted privilege, in this view of the law, is hampered with too great a measure of responsibility, is, therefore, indisposed to accept the risk which proper attention and care could certainly neutralize, the grantee is at liberty to decline its acceptance; but if it be accepted, the recipient must see to it at his peril that its valuable franchise shall not work injury to others, not favored in the grants from the legislature, but having no other function to perform with respect to the railroad, except to pay fares and on occasions defend its property from casualty or violence.

Third. The defendant also offered to prove irregularities of the ground on Virginia avenue and K street; that the avenue was the more elevated, and that because of the flowage of rain water and the passage of wagons, K street, during the work on the tunnel, was in a very bad condition. This was really the effect and substance of the extended offer, which was made without any statement of its purpose, and which, so far as we can see from the record, was entirely irrelevant and immaterial. Even with the explanation offered by counsel in the argument we are unable to see how it was admissible, under any issue in the case, and we think the exclusion was proper,

Fourth. There was a further offer "to prove—that the defendant company *was under no obligation* to erect barricades at the tunnel to prevent accidents."

The language seems to have been taken from an expression of the Supreme Court in 2 Black, 423, where the court says: "Robbins is not, however, estopped from showing that *he was under no obligation* to keep the street in a safe condition," &c. The court was there speaking of Robbins' defense, that the contractor was the responsible party, and the sense of the passage is reached by emphasizing the per-

sonal pronoun "he." But as stated in this exception, this was simply an offer on the part of the defendant to establish by evidence before the jury a proposition of law as to the liability of the company to take measures to prevent accidents at the tunnel by erecting barricades. The offer was properly rejected.

Fifth. In the absence of any evidence on the part of the defendant, the instructions of the judge were entirely proper.

The first objection of the defendant, that the instructions were erroneous because they authorized the jury to bring in *any* verdict (by which we conclude was intended any verdict for the plaintiff), has already been disposed of.

The *second objection*, that the plaintiff in the case was not entitled in any event to recover against the defendant for interest paid upon the said judgment, nor for any costs paid on account of the said suit of Barnes *vs.* The District of Columbia, did not arise out of anything in the judge's instruction, which simply said "the plaintiff was entitled to recover *the amount of the judgment* which it has paid," saying nothing of interest or costs.

Nor was the proposition in any manner presented to the court by the defendant for its ruling, nor can we see that it was ever passed on by the court.

In *Robbins vs. Chicago*, 4 Wall., 663, the circuit court charged the jury that the city was entitled to recover the amount of the judgment it had paid, *with interest*, and the Supreme Court affirmed the rulings throughout, including this.

We do not think section 829 Revised Statutes District of Columbia sustains the contention of the defendant, that such a course would not be proper in this jurisdiction.

The District of Columbia, because of the defendant's default, was obliged to pay in discharge of a judgment against it, a large sum of money, part of which, as it happened, consisted of interest and costs; and it is simply claiming in this action reimbursement for what it was thus obliged to pay by reason of the default of the defendant. In *National*

Bank vs. Mechanics' Bank, 94 U. S., 440, the court decided the depositors in a suspended national bank were entitled to receive interest from the bank from the time of the demand for their money, although the Comptroller of the Currency had urged that the statute gave no such allowance." Mr. Justice Swayne adds this language in his opinion: "The plaintiff in this action was entitled *ex æquo et bono* to the money sought to be recovered. Where the right to recover exists in this class of cases, it includes interest as well as principal, unless there is something which would render the payment of the former inequitable."

In 2d Burr, 1087, *Robinson vs. Bland*; Lord Mansfield said: "The interest is an accessory to the principal, and the plaintiff cannot bring a new action for any interest grown due between the commencement of his action and the judgment in it, and I do not know of any courts in any country (and I have looked into the matter), which did not carry interest down to the last act by which the sum was liquidated."

If the point were, therefore, properly before us we should decide it against the defendant. Indeed, a strict application of the rulings of the Supreme Court in *R. R. Co. vs. Varnell*, 98 U. S., 479, and in similar cases, would perhaps have excluded us from considering others of the questions we have felt it our duty to discuss, because of their public importance.

The judgment below is affirmed.

SAMUEL LLOYD

v.

THE WASHINGTON GASLIGHT COMPANY.

AT LAW. No. 20,827.

{ Decided December 30, 1881.

{ The CHIEF JUSTICE and Justices WYLIE, HAGNER and JAMES sitting.

On moving into his place of business plaintiff signed the following agreement with defendant, the Washington Gaslight Company: "We, whose names are hereunto subscribed, agree to take gas from the Washington Gaslight Company upon the condition that the company reserves to itself the right to refuse to furnish or at any time to discontinue gas to any premises the owner or occupant of which shall be indebted to the company for gas or fittings used upon such premises or elsewhere."

Held, that this contract related only to future delinquencies, and that defendant was liable in damages for cutting off plaintiff's supply of gas because of non-payment of an old bill for gas furnished before the signing of this contract and at another place.

STATEMENT OF THE CASE.

MOTION for new trial on exceptions.

The declaration contained two counts. The first count set out that plaintiff was the tenant in possession of premises known as 905 D street, in the city of Washington, which were supplied with gas pipes and fixtures connected through a metre with the main pipe in the street, in front of said premises, for the purpose of having the same lighted for the use and accomodation of the plaintiff, and that the defendant, without just cause, on the 17th December, 1877, cut off the flow of gas to said premises, and has failed to supply plaintiff with gas since, though often requested so to do, whereby he has sustained great loss and damage. The second count alleges that plaintiff having his said premises so supplied with gas fixtures connected with the main pipe belonging to defendant, and not being indebted in any way for gas consumed on said premises, the defendant, without just cause or right, on the 17th day of December, 1877, cut off and stopped the flow of gas through said pipe and fixtures, and has refused since to turn on the gas, or allow the same to flow through said pipes. That he was engaged on said premises in the business of a manufacturer of mattresses and feather beds and pillows; that he required gas in said

business, and he has sustained special damages by reason of being deprived thereof by the act of the defendant, &c., &c.

The defendant pleaded "not guilty," and issue was joined thereon, and at the trial the jury found for plaintiff. The case then came to the General Term on the following

BILL OF EXCEPTIONS.

Upon the trial of this case the plaintiff to maintain and prove on his part the issue joined thereon, offered and introduced in evidence to the jury tending to show that, in the month of January, 1877, he occupied premises No. 905 D street, in the city of Washington, and carried on business as a manufacturer of mattresses, using in said business, hair, husk, and straw, and had occupied said premises for some years before that, and in the conduct of said business used gas as a means for obtaining light; that he employed several hands to assist him in said business, the number differing at different dates, whose average pay was from \$4 to \$9 per week; that he was supplied with gas at the premises so mentioned until the 17th of December, 1877, when it was cut off by order of the defendant, the Washington Gaslight Company; that before the gas was cut off he was notified that the gas would be cut off, unless he paid a bill for gas consumed by him at certain other premises on Tenth street, in the city of Washington, and for which he had not paid; that when so notified he informed the agent of the defendant that he would not pay the bill for the gas consumed upon the premises on Tenth street, defendant having the landlord as security for the payment thereof; that he was ready to pay anything that he owed for gas furnished to the premises 905 D street, then occupied by him; and that if the defendant cut off the gas from the premises 905 D street for gas consumed at the premises on Tenth street, it did it at its peril and must meet the consequences; that the defendant did cut off the gas from premises 905 D street, and did not renew the supply, by reason whereof his business was much injured and he was greatly damaged—and plaintiff rested.

Whereupon the defendant, to maintain the issues on his part joined therein, offered and introduced in evidence to the jury tending to prove that, at the time that the plaintiff applied to the defendant to have gas supplied to him at the premises No. 905 D street, he signed a contract with said defendant, which was in the language following:

“ We, whose names are hereunto subscribed, agree to take gas from the Washington Gaslight Company upon the conditions and subject to regulations herein contained,” and among others, upon the condition that “ the company [meaning defendant] reserves to itself the right to furnish, or at any time to discontinue, gas to any premises, the owner or occupant of which shall be indebted to the company for gas or fittings, whether such indebtedness shall be for gas or fittings used upon such premises or elsewhere;” that in December, 1877, when the gas was cut off from the premises 905 D street, the plaintiff was indebted to defendant the sum of \$10.25 for gas consumed by him at premises No. 819 Tenth street, where he had formerly resided; that on the 15th of December, 1877, his attention was called to this indebtedness of \$10.25 by an employee of defendant, and he was notified that if he did not pay it the gas would be discontinued to him at the premises 905 D street, then occupied by him; and that he was again notified to the same effect December 17, 1878, before the gas was discontinued to those premises by defendant’s orders; that after the supply of gas had been discontinued to the said premises 905 D street by defendant’s order, the plaintiff continued to carry on his business there, using coal-oil lamps as a substitute for gas; and defendant further proved, by H. A. Linger, a witness produced and sworn in its behalf, that he, said witness, was a wholesale manufacturer of mattresses, in the city of Washington, and used coal oil whenever he worked in said manufacture at night; having no gas at his place of manufacture—it appearing upon cross-examination of said witness that he did not work much at night, and did a very small retail business—and defendant rested.

Whereupon the defendant prayed the court to instruct the jury as follows :

First. That there was no obligation, on the part of defendant, to furnish plaintiff with gas, aside from the contract between it and said plaintiff, and that no such obligation can be implied from the fact that the premises in question were supplied with pipes and fixtures connected with defendant's main, and that the relations between plaintiff and defendant in respect to the supplying of gas originate in, and are to be controlled by, the contract.

Second. That if the plaintiff for the purpose of obtaining the defendant's gas, signed a contract wherein he agreed that defendant might at any time discontinue the supply of gas to him (plaintiff) when he became, or was delinquent in the payment of any debt he might owe defendant for its gas, whether used upon, or supplied to, the premises then occupied by him or any other, and that plaintiff, being so indebted, refused to pay such debt, then—under the contract in question—defendant had a right to discontinue the supply of gas to the said plaintiff at the premises then occupied by him.

Third. That if plaintiff, when the gas was discontinued, could have used some other light, and did not, defendant could not be made responsible for any loss arising from plaintiff's neglect to use such other light, notwithstanding that the use of such other light might be accompanied with danger or inconvenience.

Fourth. That if plaintiff, by the payment of the sum of \$10.25—the amount due from him for gas consumed at 819 Tenth street—could have obtained a supply of gas at the premises 905 D street, and did not do so, but preferred to abandon his business, either in whole or in part, defendant is not responsible for any loss arising from plaintiff's refusal to pay such indebtedness.

Fifth. That if a waiver of the right of defendant to collect the amount in arrears at 819 Tenth street, by discontinuing gas to plaintiff is to be presumed from the fact that defendant entered into a new contract with plaintiff, while

such arrears were unpaid, the effect of such waiver is done away with by the notice given to plaintiff by defendant that the supply of gas would be discontinued at premises No. 905 D street, unless such arrears were paid.

Which said several instructions so prayed by defendant, the court then and there refused to give, to which refusal the defendant, by its counsel, prayed leave to except, and that the court would sign this, its bill of exceptions, according to the form of the statute in such case made and provided, and which is accordingly done this 11th day of March in the year 1881.

[SEAL.]

ARTHUR MAC ARTHUR,
Justice.

W. B. WEBB for defendant (plaintiff in error):

The declaration in this case proceeds distinctly upon the ground of a breach of duty on the part of the defendant. No contract is set out, and it is not insisted any where, either in the pleadings or in the proofs, that the damages claimed result from the breach of any express contract on the part of defendant to furnish the plaintiff with gas. The charge is that the plaintiff occupied premises supplied with gas pipes and fixtures connected through a meter with defendant's main, and was entitled to have them supplied with gas by defendant, and that defendant, without right, and without the consent of the plaintiff, cut off the gas from the said premises. The plaintiff has refused to renew the supply, though request.

As far as the matter of a contract is concerned, there is no difference that the plaintiff was not indebted to defendant, as is alleged, at the time the flow of gas was discontinued to his premises. The fact remains, that no contract alleged and none proved on the part of defendant is submitted that under these allegations the plaintiff can recover, if he recover at all, for the breach of a duty upon the defendant either by express law, or by the peculiar relations existing between it and its customers. *There can be no recovery under the pleadings, in this case, upon any implied contract.* Under these circumstances, the

question to be considered is raised by the first instruction asked of the court.

In this, the court is asked to instruct the jury that there is no obligation on the part of the defendant to furnish gas to the plaintiff, and that such obligation cannot be inferred from the fact that the premises occupied by him were furnished with fixtures connected by pipes with defendant's main.

Both in this country and in England this very question has been before the courts in several cases, and it has been uniformly held that there is no such obligation resting upon the manufacturers of illuminating gas. See the cases following: *McCune vs. Norwich City Gas Co.*, 30 Conn., 522; *Pattison Gaslight Co. vs. Brady*, 3d Dutcher, 246; *The Hodgeson Gas and Coke Co. vs. Haselwood*, 6 C. B., N. S., 239.

J. G. BIGELOW for plaintiff (defendant in error):

The record consists of the pleadings, a partial statement of the evidence, and the defendants' five rejected prayers. The first of which is comprehensive enough to cover the whole case, no matter what the proofs were. It contains the proposition that the defendant is under no obligation to furnish the plaintiff gas, by reason of anything contained in its charter. Sec. 7 (9 U. S. Statutes at Large, p. 722, July 8, 1848) provides: "That the president and directors shall have full power and authority to manufacture, make and sell gas, to be made of coal oil, tar, peat, pitch or turpentine, or other material, and to be used for the purpose of lighting the city of Washington, or the streets thereof, and any buildings, manufactories or houses therein contained and situate," &c.

Under such a provision in the charter of a gaslight company a mandamus will lie in behalf of a citizen who has complied with the general rules and regulations of the company, to compel it to furnish gas. *People vs. The Manhattan Gaslight Company*, 45 Barb., 136, S. C.; 30 Howard, 87, S. C.; 1 Abb. N. S., 404; *State vs. The Columbia Gaslight and Coke Company*, (Sup. Ct. Ohio), 8 Reporter, 533; *Morey vs. The Met. Gaslight Company of N. Y.*, 38 Superior, Ct., 185.

The peculiar relations the defendant sustains to the public are such as to make it incumbent upon the defendant to supply gas to all citizens who have complied with the general regulations of the company. This is the main object of the charter.

2. The remaining four prayers are subject to the same objection, viz.: The record does not purport to contain all the evidence in the case. In point of fact, it contains only a partial statement of the testimony of the plaintiff, and no statement at all of the testimony of several witnesses. It does not appear by the record when the gas bill at No. 819 Tenth street was paid, or what the bargain or agreement was between Lloyd and the owner of the premises in reference thereto, or whether the owner was jointly obligated with Lloyd to pay the same to the defendant.

"When the bill of exceptions does not purport to set out all the evidence, the appellate court will presume that a general affirmative charge was justified by the evidence." *School Commissioners v. Goodwin*, 30 Ala., 242. *Fleming v. Ussery*, *Ib.*, 282.

When a bill of exceptions does not purport to contain all of the evidence, the court will not examine to see if it sustains the verdict, but will presume that there was other and sufficient evidence to support it. *Peoria, &c., R. R. Co. vs. McIntire*, 89 Ill., 298; *Central R. R. Co. vs. Garish*, *Ib.*, 370.

Hence it is utterly impossible to say whether the jury was influenced one way or the other by the ruling of the court. The grounds not covered by the second, third, fourth and fifth prayers are amply sufficient to warrant the verdict. The doctrine of the third prayer is found in the first, and means simply that under no circumstances outside of a special contract to that effect, is the defendant bound to supply gas to the plaintiff. Because the verdict may be justified by the law and the evidence not in the record, arises the rule of law that an appellate court, in such a case, will presume that a general affirmative charge was given justified by such evidence.

3. The question whether the defendant, under its charter,

has the right to adopt a rule to visit the default of one of its gas consumers at his dwelling, situate in one part of the city, upon his place of business situate in another part of the city, and where there has been no default, is presented in the record.

Under its charter and its amendments this gas company can make all necessary rules that are reasonable. The company may be the judge of whether a rule is necessary, but whether it can be reasonable is for the court to determine. The court below very properly considered the company's third rule, reserving to itself the right to cut off its gas at the place of business for a default at the dwelling house of a consumer, to be unreasonable and *ultra vires*. But as before stated, however the court may resolve it, the solution cannot disturb the verdict and judgment in the case.

Mr. Justice JAMES delivered the opinion of the court.

This suit is brought to recover damages for injuries suffered by the plaintiff in consequence of the cutting off the gas from his establishment on D street in this city, by the defendant, The Washington Gaslight Company. It appears that the plaintiff had been residing at a house in another portion of the city, and that he had left there without paying his gas bill. When he moved into his D street place of business he signed a contract, which will be mentioned presently, with the gas company, for the supply of gas to that place. The company discovering that the plaintiff's bill for gas furnished at his Tenth street house was still unpaid, demanded payment of this bill and threatened in the event of his failure to do so, to discontinue the supply at his store. The plaintiff refused to pay the bill. As a consequence the company turned off the gas, claiming the right to do so under the following contract, which was signed by the plaintiff:

"We whose names are hereunto subscribed, agree to take gas from the Washington Gaslight Company upon the condition that the company reserves to itself the right to refuse to furnish or at any time to discontinue gas to any premises,

the owner or occupant of which shall be indebted to the company for gas or fittings used upon such premises or elsewhere."

The defendant claimed that this contract gave it the right to turn off the gas after it had entered upon a contract for its supply, because of the previous delinquency occurring before the execution of this contract and at another place. We have looked carefully at the terms of this contract and we are of the opinion that it does not embrace such a case. We think the words are to be construed as relating to a delinquency that should occur in the future and not one having already occurred.

The company, then, having agreed to supply the plaintiff with gas and entered upon the execution of that agreement, afterwards violated it by stopping the supply. We think this was a breach of contract for which they are liable. Whether the amount of damages assessed by the jury is excessive or not, the record does not permit us to inquire into, and the judgment of the court below must therefore be affirmed.

Mr. Justice WYLIE, dissenting, said :

This case presents the question whether a man who moves about from one house to another and runs away without paying his gas bill can compel the gas company to furnish him with gas at every new removal without being obliged to pay his old bill. The plaintiff here was in default to the gas company for a bill on his Tenth street house. The company then gave him notice that unless he paid this bill it would turn off the gas from his D street place. The plaintiff refused to pay and the company accordingly shut off the supply of gas, and the court have allowed him to recover damages upon this state of facts.

It may be said that, because this gas company carries on a business analogous to that of a common carrier, it is obliged to furnish gas to every person who applies for it ; and yet it is laid down by all the authorities that even a common carrier may, for good reasons, refuse to carry for certain

persons. Suppose that A, having had his goods transported, should refuse to pay the freight after delivering at their place of destination, and then a few days after should offer for shipment another lot of goods to the same carrier. The latter might well say: "Pay for what we have already carried, and we will carry these." But A answers: "No, you are a common carrier, and you must carry all the goods that I want you to whether I pay you the former bill or not." Now will any court in a case of that kind mulct the carrier in damages because it refuses to carry for a man who refuses to pay his freight bill. I think there is no such law as would require that. I put my dissent to this decision of the court, upon grounds entirely independent of the special contract entered into by the parties. My learned brethren are of the opinion that this contract relates to the future entirely. I think, however, a fair construction of that agreement would bring this case within it, but I do not insist upon that. I base my opinion upon general principles. The business of a gas company is in some respects like that of a common carrier, and a common carrier is not bound to carry a man's goods indefinitely who refuses to pay up for past dues. And this company, I think, had a perfect right to say to this man, "We will not continue to furnish you with gas unless you pay up your arrears."

THE UNITED STATES vs. THOMAS J. BICKSLER.

CRIMINAL DOCKET, No. 13,950.

{ Decided December 30, 1881.

{ Justices WYLIE, HAGNER and JAMES sitting.

1. Sections 5457 and 5458 R. S. U. S. differ from each other, both in the description of the crimes therein denounced and as to their punishment.
2. Under Section 5457 the offence of having in possession counterfeit gold or silver coins is not complete unless the accused had them in his possession "knowing the same to be false, forged, or counterfeited." But there is no necessity for the averment or proof of such *scienter* under Section 5458, which provides for punishing the having in possession counterfeit *minor coinage*.
3. The accused for the former offence may be imprisoned to the extent of ten years, while the limit of imprisonment for the latter is three years. Therefore, where the prisoner is indicted and found guilty under the latter section (5458), a sentence of imprisonment for *eight* years is erroneous.
4. *Semble*, That where the indictment is good but the term of imprisonment to which the prisoner has been sentenced exceeds the period fixed by the statute, the case may be remanded to the court below for the imposition of a shorter term.
5. Section 3515 R. S. U. S. establishes certain coins to which it affixes a certain designation, and by which alone they are thereafter to be known. They are, "minor coins;" known by no other appellation; and none other than these particular coins are embraced in that name, and as none of these minor coins contain silver, there is no such thing known to the law as "minor silver coinage."
6. The old five cent pieces are not "minor coins" within the meaning of the law. The punishment for forging them must be sought under the section punishing the counterfeiting of silver coins, and not under the section relating to minor coinage. An indictment therefore which charges the prisoner with counterfeiting certain coins "in the resemblance and similitude of the *minor silver coinage* which has been coined at the mints of the United States called a half-dime," is contradictory and sets forth an offence not known to the law.
7. Although there has been no demurrer interposed or motion to quash the indictment, this court is nevertheless at liberty to pass upon defects in the indictment, upon a motion for a new trial on exceptions to the rulings of the court below.
8. The reversing of the judgment of the court below, because of the insufficiency of the indictment, does not exonerate the prisoner from being tried upon a good indictment, the first trial being simply what is known as a mistrial.
9. Where the prisoner is charged with having in his possession certain counterfeit money with intent to defraud, it is not necessary to give the *name* of the person to be defrauded, the averment to defraud "a

certain person to the jurors unknown," or "whomsoever he might be able to defraud," is a sufficient description within the terms of the statute. The statute does not require that there shall have been a consummation of the fraud by the actual passing of the money. The offence consists of having it in possession with intent to defraud. The possession alone is not criminal if unaccompanied with the intent.

10. Testimony of an accomplice—the ruling on this subject in *The United States v. Neverson*, *ante*, 152, considered*

THE CASE is stated in the opinion.

GEORGE B. CORKHILL and R. ROSS PERRY for United States.

JOHN E. NORRIS for defendant.

Mr. Justice HAGNER delivered the opinion of the Court:

The indictment under which the defendant in this case was tried, contains five counts; the first of which is in the following words:

"The grand jurors of the United States of America in and for the county and District aforesaid, upon their oath present: That one Thomas J. Bicksler, late of the county and District aforesaid, on the first day of January, in the year of our Lord one thousand eight hundred and eighty, and at divers other days between the said last named day and the date of the taking of this inquisition, at the county and District aforesaid, ten certain false, forged and counterfeit coins, each in the resemblance and similitude of the minor silver coinage which has been coined at the mints of the United States, called a half dollar, ten certain false, forged and counterfeited coins, each in the resemblance and similitude of the minor silver coinage which has been coined at the mints of the United States, called a quarter dollar, ten certain false, forged and counterfeited coins, each in the resemblance and similitude of the minor silver coinage which has been coined at the mints of the United States, called a dime, and ten certain false, forged and counterfeited coins each in the resemblance and similitude of the minor silver coinage which has been coined at the mints of the United

*The matter digested in notes 9 and 10 is not given in the syllabus of this case as any part of the *decision*, but rather as intimations thrown out at the close of the opinion in view, as is there said, of the probability of a new trial.—F. H. M.

States, called a half dime, with force and arms, unlawfully, knowingly and feloniously did have in his possession with intent to defraud a certain person to the grand jurors aforesaid unknown, against the form of the statute in such case made and provided and against the peace and government of the United States of America."

The second count is in the same words, except that the intent charged is to defraud, "whosoever he might be able to defraud;" and the 3d, 4th and 5th counts charge the intent to defraud certain individuals named in those counts respectively.

The jury rendered a verdict of guilty on the 1st, 2d and 5th counts, and not guilty as to the others; and the court sentenced the prisoner to the penitentiary for *eight years*.

The case is here on a motion for a new trial on exceptions to several rulings of the court below.

1st. Section 3513 of the Revised Statutes of the United States, provides that :

"The silver coins of the United States shall be a trade-dollar, a half dollar, or fifty cent piece, a quarter dollar, or twenty-five cent piece, a dime, or ten cent piece," &c. And it proceeds to establish the weight of the coins.

Section 3515 declares :

"The minor coins of the United States shall be a five cent piece, a three cent piece and a one cent piece. The alloy for the five and three cent pieces shall be of copper and nickel, to be composed of three-fourths copper and one-fourth nickel.

"The alloy of the one cent piece shall be ninety-five per centum of copper and five per centum of tin and zinc, in such proportions as shall be determined by the Director of the Mint."

The section then proceeds to establish the weight of the minor coins.

It is evident these minor coins contain no particle of silver, or other substance than the copper and nickel composition in the proportions designated.

It appears, then, that the lowest silver coin of the United States now recognised in use is the ten cent piece, and that

“*the minor coins*” of the United States can no more be properly called “silver coins” than they can be described as “gold coins.”

By section 5457, under Article “Crimes,” it is provided that :

“Every person who falsely makes, forges or counterfeits, or causes or procures to be falsely made, forged or counterfeited, or willingly aids or assists in falsely making, forging or counterfeiting, any coin or bars in similitude of the *gold or silver coins* or bars which have been, or hereafter may be, coined or stamped at the mints and assay offices of the United States, or in resemblance or similitude of any foreign *gold or silver coin* which by law is, or hereafter may be, current in the United States, or are in actual use and circulation as money within the United States, or who passes, utters, publishes or sells, or attempts to pass, utter, publish or sell, or bring into the United States from any foreign place, knowing the same to be false, forged or counterfeited, with intent to defraud any body politic or corporate, or any other person or persons whatsoever; or has in his possession any such false, forged or counterfeited coin or bars, knowing the same to be false, forged or counterfeited, with intent to defraud any body politic or corporate, or any other person or persons whatsoever, shall be punished by a fine of not more than five thousand dollars, and by imprisonment at hard labor not more than *ten* years.”

Then Section 5458 provides that—

“Every person who falsely makes, forges or counterfeits, or causes or procures to be falsely made, forged or counterfeited, any coins in the resemblance or similitude of any of the *minor coinage* which has been, or hereafter may be, coined at the mints of the United States; or who passes, utters, publishes, or sells, or brings into the United States from any foreign place, or has in his possession, any *such* false, forged or counterfeited coin, with intent to defraud any person whatsoever, shall be punished by a fine of not more than one thousand dollars, and by imprisonment at hard labor for not more than *three* years.”

These sections differ both in the description of the crimes therein denounced and as to their punishment.

The offence of having in possession counterfeits of *gold or silver coins* is not complete unless the accused had them in his possession "*knowing the same to be false, forged or counterfeited*;" whereas there is no necessity for the averment or proof of such *scienter* under the section punishing the possession of counterfeit *minor coinage*.

The accused for the former offence may be imprisoned to the extent of *ten* years, while the limit of imprisonment under the latter section is *three* years.

It is manifest the indictment was framed under Section 5458, both because the offence charged refers to the *minor coinage*, which is not comprehended under Section 5457; and also because it omits the charge of the *scienter*, which is indispensable under the latter section. And as the imprisonment under Section 5458 cannot exceed *three* years, the sentence for eight years was erroneous, and the judgment must be reversed upon this ground.

2d. The next inquiry is, whether the accused could be punished under this indictment at all, and whether we can remand the case to the court below for the imposition of a sentence of imprisonment not exceeding three years. Section 3515, as we have seen, establishes certain coins to which it affixes designations by which alone they are thereafter to be known. They are "*minor coins*;" known by no other appellation; and none other than these particular coins are embraced in that name. And as none of the minor coins contain silver, there is no such thing known to the law as "*minor silver coinage*." There is no silver money now coined less in value than the dime. The old five cent pieces, some of which remain in circulation, are not *minor coins*, within the meaning of the law. The punishment for forging them must be sought under the section punishing the counterfeiting of *silver* coins, and not under the section relating to the *minor coinage*; for that is no more silver than it is gold. When the law mentions *minor coins* it in fact declares that it refers to coins that are not silver. This indictment, there-

fore, is contradictory, and sets forth an offence not known to the law ; for we cannot reject the word "silver" as superfluous, and help out the indictment by intendment.

In the case of the United States *vs.* Gardner, in 10th Peters, the accused was indicted for counterfeiting sundry pieces of counterfeit coin in the resemblance of a foreign silver coin, to wit, a silver coin of Spain, called head-pistareen. It appears that at a very early day Congress declared that the silver money of the United States should consist of dollars, half dollars, quarter dollars, dimes and half dimes, and established their respective values. It also declared that foreign silver coins should pass current at the rates of one hundred cents for the Spanish milled dollars, "and in proportion for the parts of a dollar." And by another act the punishment was prescribed for counterfeiting "any coin in the resemblance or similitude of any foreign gold or silver coin which by law now is, or hereafter may be, *made current in the United States.*"

It appeared that the silver coin known as a head-pistareen of Spain, purported to be equal in value to one-fourth of the Spanish milled dollar, but that it commonly passed in the United States for twenty cents, although its value by assay at the mint was nineteen cents and a fraction.

The question for the court was whether the pistareen, passing current as a twenty cent piece, was a foreign coin which by law was current in the United States, so that the counterfeiting of such a coin could be punished under the statute. The Supreme Court decided that it was not. Although passing current in one sense, at the rate of twenty cents, it was not *current by law*. The judgment of the court concluded in these words :

"When the terms 'parts of a dollar' are used in these laws, it is in reference to the division of a dollar, as established at the mint ; and there being no such part as a twenty cent piece, or fifth of a dollar, we think the pistareen is not a coin made current by law. But if this is a doubtful construction of the act, it ought to be adopted in a case so highly penal as the present."

In this case there was no demurrer interposed, or motion to quash the indictment. But we nevertheless think we are at liberty to consider the defects in the indictment at this time in view of the decision in the case of *United States vs. Gooding*, 12 Wheat., 478. It was there held it was competent for the court while the case was under argument before the jury to pass upon defects in an indictment not presented by demurrer or motion to quash, although the practice was not one to be encouraged. In this case we are compelled to notice this point. Our ruling upon this point does not exonerate the prisoner from future responsibility if he is guilty. The trial below was simply what is known as a mis-trial. The accused has been arraigned upon an indictment which is insufficient. In the case of *Cochrane vs. The State*, 6th Maryland, 406, while the judgment of the court below was found to be wrong because of insufficiency in the indictment it was still held that the party charged with the crime could be arrested immediately and held to answer. In view of the probability of such a re-trial it may be proper that we should proceed to notice some of the points argued here by the counsel for the prisoner.

3d. The first instruction asked by the counsel for the prisoner was :

“In order to convict the defendant, the jury must be satisfied beyond a reasonable doubt that he had in his possession at the time of finding the indictment, or at other times theretofore before his arrest and confinement, the counterfeit money, or some of it charged in the indictment, with intent to defraud some one named or *described* in the indictment and if they do not so find they will acquit him.”

If the word “described” is taken in its proper and legal signification, the instruction was proper in form. If, however, it was designed as a request to the court to say that it was essential to *give the name* of the person to be defrauded, it was incorrect. The averment “to defraud a certain person to the jurors unknown,” or “whomsoever he might be able to defraud,” was a sufficient description within the terms of the statute. The court properly said it was not necessary

to show that this prisoner had any particular person in his mind, but if he had a general intention to defraud and the fraud was afterwards perpetrated through his furnishing the counterfeit money, his general intention was to be applied to the particular fraud, whether the money was passed or not. But the statute does not require that there shall have been consummation of the fraud by actually passing the money. The offense consists in his having it in his possession with intent to defraud. The jury cannot convict unless they find this intent, and very properly, since a clergyman may have a counterfeit coin in his possession, which he may have received at church; but this possession is not criminal because it is unaccompanied by the intention to defraud.

4th. The court refused to instruct the jury that—

“ Unless they are satisfied from the evidence that there was a connection between the defendant, Westcot, and Baker, *in the passing* of the said alleged counterfeit money, then they must acquit.”

But we have seen that it was of no consequence to the offence stated in the indictment, that the prisoner should have actually passed the money ; and if it were, there was no necessity that any connection between the parties named should be shown. If the prisoner had the counterfeit coin in his possession with an intention to defraud, the offence was complete ; and the court was right in refusing the instruction.

5th. The defendant then offered the following prayer :

“ The court instructs the jury that the evidence of an accomplice is entirely for their consideration, and that whilst it is in their power to convict on the uncorroborated testimony of an accomplice, yet they *ought not* to find a verdict against the defendant when such evidence is not corroborated.”

This was granted by the court with the qualification that the facts testified to by other witnesses were competent evidence to be considered by the jury as corroborative of the testimony of Emma Baker, the accomplice.

In the recently reported case of *The United States vs. Nev-*

erson* this point was considered; and the law there laid down that the jury may, if they see fit, convict, even in a capital case, upon the unsupported testimony of an accomplice; but the court should advise the jury that they should not convict upon unsupported evidence alone and without corroboration.

6th. The defendant asked for the further instruction:

“The jury must be satisfied beyond a reasonable doubt that the counterfeit coin described was passed upon some one of the parties named in the indictment, by defendant, or by some person or persons who procured said coin from defendant, and such actually at the request or with the knowledge of the defendant.”

This prayer again raises a point which we have already noticed, respecting the passing of the counterfeit money, a matter not at all involved in the charge under consideration, and was properly refused.

The cases referred to in Russell and Ryan, have been examined. They are not applicable here, for the reason that the statute of George II, upon which they are decided, is entirely different from ours, and does not undertake to punish the bare possession of the counterfeit money with intent to defraud, as is the case in our statute.

The judgment below is therefore reversed.

*Ante, p. 152.

JOHN C. SCHNEIDER & SON vs. SARAH GARLAND.

AT LAW. No. 21,307.

{ Decided JANUARY 5, 1883.

{ The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

The statute in force within the District of Columbia governing the rights and liabilities of married women possessed of separate property, and commonly called the Married Woman's Act, has not changed the common law rule that a married woman cannot be sued *at law* for supplies furnished to her for the support of the family, although they were furnished upon the faith and credit of her separate estate, and upon her promise to pay for the same out of said estate.

THE CASE is stated in the opinion.

ANDREW B. DUVALL for plaintiff:

There was no error in the charge of the court, while the general engagements of a *feme covert* are void; yet she may, under the statute, contract as if she was *sole* in a matter having relation to her separate estate; that is, by agreement, annexed to and connected with it, for its benefit, or directly upon its faith and credit. *Stephen vs. Beall*, 22 Wall., 388; *Harmon vs. Garland*, Wash. L. R., Vol. IX, No. 10;* *Macvey vs. Cantrel*, 70 N. Y., 295.

Her capacity to contract is under the statute, an implication of law, and not of equity; and therefore all contracts made by her within the scope of that legal capacity are legal contracts, and cognizable in a court of law. *Rich vs. Hyatt*, 3 Mac A., 536; *Knowles vs. Dodge*, Wash. L. R., Vol. IX, No. 15;† *Cookson vs. Toole*, 59 Ill., 515; *Williams vs. Hugnew*, 69 Ill., 214; *Conway vs. Smith*, 13 Wis., 140.

A married woman having a separate estate, engaged board for herself and husband, promising to pay for the same and to charge her separate property with such payment; held, that the contract was binding; that the separate estate was chargeable for the board and that the same was properly set off in an action upon a note given to her, transferred after maturity. *Maxon vs. Scott*, 55 N. Y., 247.

A contract similar to the case at bar was maintained at law in a State where the strictest construction of the mar-

*Ante, p. 1.

†Ante, p. 66.

ried woman's statute prevails. *Hammond vs. Corbatt*, 51 N. H., 305, 211.

The liability at law is *res adjudicata* in this court, *supra*, *Harmon vs. Garland*; as this court remarks in *Knowles vs. Dodge*, "It would be a fraud on her part to allow her to repudiate a debt which she herself had contracted in this way for the maintenance of her otherwise helpless family and herself."

HAGNER & MADDOX for defendant :

The demurrer to the evidence should have been sustained. The plaintiff neither averred nor proved a contract within a married woman's capacity to make, under sections 727 and 729, R. S. D. C.

This court has held that the statute confers on married women no new rights in respect to the means of acquiring property. It does not authorise them to make an executory contract for the purchase of another's estate. *Rich v. Hyatt*, 3 MacA., 536.

Unless the property so acquired be necessary for the beneficial enjoyment of that already owned by her. *Harmon et al. v. Garland*, Wash. L. R., Vol. IX, No. 10.*

How can a contract for the purchase of necessaries be brought within this exception?

The plaintiffs have mistaken their tribunal. Their remedy should have been sought on the equity side of this court.

So far as relates to the engagements not within the capacity given by implication of the statute, the remedy when a proper case exists, must be sought under the rules in relation to the general contracts of married women and their binding effect on their separate estates in equity, as under the old forms of settlement. *Cookson v. Toole*, 59 Ills., 521 ; *Bauman, Adm'r, v. Street*, 76 Ills., 529 ; *Owen v. Cawley*, 36 N. Y., 604.

Mr. Justice HAGNER delivered the opinion of the court :

This is an action at law, brought by the plaintiffs to recover a sum of money claimed to be due by the defendant, a

*Ante, p. 1.

married woman owning separate estate in her own right in the District of Columbia, for groceries sold and delivered to her under the following circumstance, as set forth in the bill of exception :

"At the trial of this cause the plaintiffs, to maintain the issue on their part joined, offered and gave evidence tending to show that in September, 1878, the defendant, a married woman, owning separate estate in her own right in the District, who prior to that time had dealt with the plaintiffs exclusively for cash, requested that credit on a running account, to the amount of about \$20 a month, be extended to her. She stated to the plaintiffs at that time that she was the owner of several houses in her own right, and that she would pay every month out of her separate estate ; that she made the bills and would pay them ; that the account was for groceries and necessaries for the family. The account was opened, and, running largely in excess of \$20 a month, had, in December following, amounted to \$250 and upwards. Thereafter the defendant, at different times, paid \$100 on the account. In April, 1879, there still being due \$155.87, the plaintiffs called upon the defendant, and demanded a settlement. She then said that she was about to sell one of her houses, situated on F street, and would pay the plaintiffs out of the proceeds of this sale. The house is not yet sold. The defendant was living with her husband and his family at Clark Mills' place in the county. The goods were delivered there. The husband was notoriously insolvent and out of employment. The plaintiffs there rested.

The defendant thereupon asked the court to instruct the jury as follows :

" 1st. That on the whole evidence the plaintiffs were not entitled to recover, and

" 2d. That a married woman living with her husband cannot render herself personally liable on a verbal contract for the purchase of necessaries for the family, without charging her separate estate for the payment of the debt, or promising to pay out of her separate estate."

These instructions the court refused to give, but, as the exception states, charged the jury substantially, that if they believed from the evidence, that defendant's husband was insolvent and without means to provide for his family, and that the plaintiffs, relying upon the faith and credit of defendant's separate estate, extended the credit and delivered the merchandise to her upon her promise to pay for the same out of her separate estate; that plaintiffs were entitled to recover against the defendant.

To the court's refusal to charge as prayed, the defendant excepted, and the verdict being for the plaintiff, the case is brought here on appeal.

It involves the construction of the statutes in force within this District governing the rights and liabilities of married women possessed of separate estates. The statutes have repeatedly been before us for examination in different forms, but this is the first instance in which the question has been presented whether a married woman whose husband is insolvent and without means to provide for the family, can be sued at law for supplies furnished to her for the support of the family by merchants who relied upon the faith and credit of her separate property, and delivered the merchandise to her upon her verbal promise to pay for the same out of such separate estate.

We must apply in the examination of these statutes the universal rules of interpretation and, *first*, consider, what was the state of the law before their enactment and, *next*, the mischief to be remedied.

Nothing can be plainer than the proposition that at common law all contracts and agreements of a married woman were held absolutely void at law; that all proceedings at law to enforce them were fruitless and illegal, and that she could be compelled to perform them in equity alone. As stated succinctly by Chancellor Kent in 2 Com., 160, 'at law a woman cannot be sued as a *feme sole* while the relation of marriage exists and she and her husband are living under the same government.'

The exceptional cases, where the wife might be sued at

law, are all comprehended within this statement ; as, where the husband was banished, or had abjured the realm, or was an alien living abroad; but there is no trace anywhere to be found in the cases, of the idea that at common law the insolvency of a husband, living with his wife, afforded any warrant for the claim to sue the wife at law for any agreement on her part of any description. It is well settled that the courts have declined to invade these common law rules beyond the requirements of the amendatory statutes, but have uniformly held that the common law disabilities continue except so far as they have been removed by statute. *Bradstreet vs. Baer*, 41 Md., 23.

It is equally well known that at the common law, in the absence of a previous settlement, all the personal property of the wife devolved absolutely upon the husband, and that, during the coverture, he was entitled to the entire control and management of her realty, and the sole enjoyment of its rents and profits, without obligation on his part to repair it, and without power on her part to dispose of it by will or convey away a particle of it ; or to enter into any contract or agreement for its preservation or improvement without his assent.

It was to change these features of the common law, so liable to be enforced to the injury of the wife's interests, that Congress passed the statute of April 10, 1869, contained in sections 727 to 730, inclusive, of the Revised Statutes of the District of Columbia.

Section 727 declares : " In the District, the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were unmarried, and shall not be subject to the disposal of her husband nor be liable for his debts."

It is apparent that this section was only designed to change the previous rule of law *as to the ownership* of the wife's property, and thus cure one of the then existing mischiefs.

But it is silent as to the question of her existing disability to contract. By virtue of this section, her real and personal property designed to be embraced within it, belongs absolutely to her, just as similar property may belong to the wife's infant brother; but, so far as this section is concerned, she remained more incapacitated to make a contract to bind her at law than her infant brother, since he might bind himself for necessities by a contract which might be enforced at law.

By section 728, it is provided: "Any married woman may convey, devise or bequeath her property or any interest therein in the same manner and with like effect as if she were unmarried."

The purpose of this section undoubtedly was solely what it expresses in words. No power to enter into any contract, enforceable at law, can be gathered from its language.

The question of the wife's right to contract is treated of in the two succeeding sections.

Section 729. "Any married woman may contract and sue and be sued in her own name *in all matters having relation to her sole and separate property*, in the same manner as if she were unmarried."

That the words "having relation to her sole and separate property," were designed to limit the range of her contracts, is obvious. Unless such a purpose existed on the part of Congress, the words would have been omitted, and she would have been clothed with unlimited power to contract upon all subjects as a *sole trader*, and to make any purchases necessary to carry on such business. The statutes of some of the States confer such power upon a *feme covert*, but in the language of this court in *Ritch vs. Hyatt*, 3 Mac A., 541, "our statute has conferred neither of these powers on the married woman."

What then is the meaning of this phrase? It is plain that "*the matters*" referred to must be such as *actually* have "relation to her sole and separate property," and not such as she herself may choose to say have such relation, irrespective of the fact. Unless this be so, her separate estate may be liable at law for whatever useless or frivolous expenditure a silly woman

may see fit to embark in for her personal adornment, provided she may declare it relates to her estate. Such a construction would do violence to the words and to the purpose of the law giver. The words "matters having relation to," clearly mean matters appertaining to or having connection with or about her estate, *in fact*, and not such as may be claimed to relate to it, simply because she may have seen fit to say, in opposition to the facts, that they do relate to it. In no just sense of the language can it be said that agreements for the hire of a stall at an opera, or to pay the expenses of costly balls or for extravagant gems, are contracts relating to the wife's separate estate.

The contracts referred to in the statute were such as, in justice, should have been made binding upon her and her property, after all of it, both personal and real, had been removed from the disposal of the husband, and vested as absolutely in her as if she were unmarried. The repair and improvement of the separate estate of an unmarried sister should not be charged against a married man, but should be paid by the owner who has a right to its revenues; and the wife, under section 727, of our Revised Statutes, is as much an unmarried woman as to her separate property as the spinster in the case we have supposed.

The language of section 729 creates powers and liabilities with respect to the same subject-matter, and deals with that subject-matter throughout. The section gives the married woman power *to contract* "in all matters having relation to her sole and separate estate," *to sue* in all such matters, and renders her liable *to be sued* in respect of the same matters. If she can contract or be sued respecting any particular "matter," she can equally *sue* with respect to the same matter; and of course upon the same ground—that it has "relation to her sole and separate estate."

If a married woman can contract and be sued at law for a grocer's bill, she could equally sue the tradesman at law, if the goods furnished were inferior in quality, or less in quantity than agreed on or because he refused to supply them after contracting so to do. In such case the goods would either

have been consumed or never furnished to her. Could she be said then to sue in a matter having relation to her sole and separate estate? To what part of her separate estate would such suit relate? But if she could not sue in such case because the matter of the suit is not one relating to her separate estate, neither can she contract or be sued with respect to such matter for the same reason.

Again, the last provision on the subject, section 730, declares—

“Neither the husband nor his property shall be bound by any such contract made by a married woman, nor liable in any recovery against her in any such suit; but judgment may be enforced by execution against her sole and separate estate in the same manner as if she were unmarried.”

This is a plain legislative declaration that the husband and his estate shall not be answerable for any contract the wife is authorized to make by the previous section. If she makes such a contract, he and his property are forever absolved from its payment.

The provision is reasonable enough, if the power of the wife to contract is confined, as was intended, to matters really and actually about and connected with and appertaining to—that is, “having relation to”—her own estate. Upon no reason in justice should the husband be answerable in such a case, for there was no original liability upon his part to pay for the improvement of another's property, and he has made no contract to do so. But if the construction insisted on by the plaintiffs' counsel be correct, this provision of the section is indefensible in reason, morals, or public policy.

The husband is bound to support his family, and especially to supply them with food, shelter and clothing according to his condition in life; and no act or agreement by the wife while they are living together, can absolve him from this duty.

The grocer's bill, which may consist in great part of supplies ministering to his vices and idleness, is payable by him.

Primarily and honestly, it always should be chargeable to the husband, until it is discharged.

But if the wife, as in the present case, can take this charge upon herself by such an agreement as is here shown, the tradesman can never sue the husband, nor recover a cent from him on account of the claim. The statute does not require that the married woman shall *retain* her "sole and separate estate" until the time of the suit; it is enough that she was possessed of such at the time of the contract.

It need not consist of real estate, but may equally be personalty, which she may have sold the day after the contract.

Or, if real estate, it may have been bound by prior obligations, which may render the tradesman's right of recovery entirely useless to him. And notwithstanding the husband, by a turn of the wheel of fortune, may have become wealthy in the meantime, he is to go scot free from liability and the plaintiff is left to watch his chance to obtain payment from the married woman—perhaps from what she may acquire as the widow of the real debtor.

Could Congress have intended to enact a law having such consequences? There could be nothing devised more likely to promote idleness and vice than a statute thus offering a premium to worthless husbands to refrain from all effort to gain a support for their families, and to appropriate what they may casually pick up, to their own private indulgences.

We think the question has been placed upon its proper foundation in the case of *Ritch vs. Hyatt* before referred to. It appeared in that case that a married woman was seized of an undivided interest in a parcel of land; and that she, with two others of her co-tenants, "with the purpose of benefiting her sole and separate estate," (as was averred in the *nar*,) agreed to purchase the undivided share of the remaining co-tenant, and joined in the execution of a bond for the purchase money of this fourth part; and an action was brought in this court against the married woman, at law, on the bond.

It was insisted that this contract was made in a matter relating to her sole and separate estate; but this position was not sustained by the court, which held that the contract

was about a matter relating to something else—namely, to an estate which was not *her* property at the time, but belonged to some one else ; that it therefore related to her co-tenant's estate, and that she could not contract at law with relation to such property, though with a view to its acquisition.

In other words, that a married woman cannot undertake to purchase an article and call it when bought, her separate estate, so that her agreement to buy the thing thus purchased may be considered a contract in relation to the property she thus proposes for the first time to acquire. *A fortiori* would this be so where the thing acquired consisted of supplies, consumed in their use, and never, except by the wildest latitude of construction, admitting of the designation of "her sole and separate estate."

We have been referred to the case of *Harmon vs. Garland*, recently decided by this court, as sustaining the plaintiff's right to recover in this action.

In that case the married woman purchased furniture under circumstances stated as follows in the special verdict : " We further find that said furniture was bought and used by the defendant for furnishing a house forming part of her separate estate, which house so furnished defendant thereafter rented." Justice Wylie, delivering the opinion of the court, said, " we think it is a fair inference from the verdict in this case, that the defendant in order to rent the house to advantage had to furnish it."

Under these facts the court held that the contract was about a matter relating to her separate estate ; like the purchase of stock or employment of labor for the working of her farm. But the theory of the decision, though it went further than this court has gone in any other case, was entirely consistent with the view of the law as expressed in the present case, and furnishes no support to the plaintiff's claim to recover.

Nothing we have said is designed to controvert the principle which recognizes the right of a creditor to enforce *in equity* any contract or agreement made by a married woman

with reference to her separate estate. The jurisdiction of chancery to decree relief in such cases has never been doubted, certainly not for centuries past ; and the existence of this authority is an ample protection against the extreme and improbable cases suggested, that because of this view of the law, the possessor of valuable property may suffer for the necessities of life. We are simply deciding the question submitted to us in this case ; and believing that no right of action exists at law against the defendant, the ruling of the court below in the third exception set forth, is reversed.

THE DISTRICT OF COLUMBIA

vs.

THE WASHINGTON AND GEORGETOWN RAILROAD Co.

AT LAW. No. 22,457.

SAME

Decided Jan. 9, 1892.
 { The C.J. v. J. H. Hays & James S. Hays vs.

THE METROPOLITAN RAILROAD Co.

AT LAW. No. 22,458.

1. Statutes of limitations are to be construed strictly and will not be extended by implication.
2. To arrive at the correct meaning of a statute the court will examine its language throughout and will import words from all portions of it to qualify the meaning of the whole.
3. As respects public rights municipal corporations are not within ordinary limitation statutes.
4. Under the second section of the Revised Statutes relating to the District of Columbia, the liability of the District to be sued and impleaded to the full extent of other municipalities is plainly implied in the general language which creates it "a body corporate for municipal purposes," and, in the absence of any provision to the contrary, whatever liabilities may properly attach to municipalities in general, are equally devolved upon the District government. Hence, whenever the Maryland act of 1715, ch. 23, which is the statute of limitations in force in this District, may be interposed to a claim of an ordinary municipality, it may be availed of against the District of Columbia.
5. By the charter of certain street railway companies of Washington and Georgetown, the companies were required to keep their tracks and the adjacent part of the streets, at all times, well paved and in good order, without expense to the United States, and to the District, the District being also bound by statute to take all proper care of its streets and avenues. On the failure of the companies to perform this duty the work was done and paid for by the District, and to obtain reimbursement for the outlay, suit was afterwards brought by it against the companies.

Held, 1. That after the acceptance of their charters, the companies could not be heard to object that the provision was illegal or incapable of enforcement against them. 2. That the right of action grew out of and was founded upon the obligation in the charters as well of the District as of the companies, and that the suit was an action founded upon those statutes. 3. That the statutory obligation of the companies had been broken if the paving had caused any expense to the District, and this fact would furnish the consideration and foundation of the claim for reimbursement. 4. That the action was not within any of the enumerated actions mentioned in the 1st section of the Maryland act of 1715, chap. 23, to which the plea of limitation would be available.

6. Charges or assessments made against property owners for street improvements, by a municipality having power so to do, are in the nature of taxes and in the absence of some additional provision declaring limitation a bar, such a plea is no defense.

7. When the charters of the companies bind them to pave and keep in repair the streets upon which their tracks are laid and they neglect so to do, and the District, thereupon does the work and brings suit against them for reimbursement, the fact that no assessment had been made against the companies by the District for such work is immaterial in its effect upon the right to set up limitations as a defense; the companies occupy the same position with respect to the statute of limitations that they would have held if the amount chargeable against them had been made the subject of a regular assessment which they had refused to pay and for which the action had been brought.
8. One section of the charters of the companies required them to keep their tracks, &c., at all times, *well paved and in good order*; and by another section it was provided, "that nothing in this act shall prevent the government, at any time, from *altering the grades or otherwise improving all* avenues or streets occupied by said roads, or the respective cities from so altering or improving such streets or avenues, and the sewerage thereof, as may be under their respective authority and control; *and in such event it shall be the duty of such company to change their said railroad so as to conform to such grade or pavement.* The companies' charters also provided, "that the use and maintenance of said roads shall be subject to the municipal regulations of the cities of Washington and Georgetown."
- Held.* That the companies were bound by the charters not only to pave once the designated portions of the streets, but to repair the paving and to change the grade and lay new pavements within the prescribed limits whenever the municipality, in its discretion, should see proper to make changes in the streets, rendering such work proper to be done on the part of the companies.
9. Where, on the failure of the companies to pave, &c., as required by their charters, the work is done by the District, assumpsit for the recovery of the sum expended is a more appropriate form of action than debt; and the declaration should charge that the sums paid were what the work was reasonably worth, the recovery being limited to such reasonable expenses incurred by the city as shall be ascertained by a jury. Extravagant amounts recklessly expended in the work without reference to its true value should not be allowed.

THE CASE is stated in the opinion.

RIDDLE & MILLER for plaintiff.

ENOCH TOTTEN for defendant.

Mr. Justice HAGNER delivered the opinion of the Court:

These cases have been argued here in the first instance, and the interesting questions involved have been exhaustively discussed by counsel.

In the first case the District of Columbia claims from the Washington & Georgetown Company \$20,049.66, and in the second, the sum of \$153,216.15 from the Metropolitan Company.

The pleadings are alike in essentials, and we shall consider those in the latter case, which we find printed in the record.

The declaration avers the incorporation of the plaintiff and defendant corporations; that the District Government is intrusted by law with ample powers to take charge of and improve all streets, avenues, &c., of the consolidated municipality; that by the charter of the defendant, which it duly accepted, it was authorized to construct a street railroad between certain points therein named; that it entered upon, laid down and constructed its tracks along the streets and avenues designated, and still continues to retain and work its track along and over such streets and avenues. That by the fourth section of the charter it was provided: "That the said corporation hereby created shall be bound to keep said tracks, and for the space of two (2) feet beyond the outer rail thereof, and also the space between the tracks, at all times well paved and in good order without expense to the United States or to the city of Washington." That afterwards, in the due exercise of the powers conferred upon the plaintiff and pursuant to law, it ordered and directed that said streets and avenues should be repaired and improved as follows, amending the grades and laying down new and greatly needed pavements, to wit: First street east, concrete pavement, (with a similar statement as to a large number of other streets and avenues); of which the defendant had notice. That thereupon it became and was the duty of said defendant, pursuant to said fourth section of its charter, to conform its tracks to said grade, and pave the entire space between two lines running parallel with its tracks, two feet from and outside of its exterior rails, upon and along each and all of said streets and avenues so occupied by it, in conformity with the plan prescribed by the plaintiff; which said duty and obligation said railroad company neglected to do, and did not do; and thereupon the plaintiff, in execution of its orders and plans, and to complete the repairs and improvements of said streets and avenues, was obliged to and did grade and pave said portions of said streets and avenues which, as aforesaid, should have been graded and paved by said railroad company, to wit: On said First street east, one thousand four hundred and seventy-six

and sixteen hund redths (1,476.16) square yards of concrete pavement at three dollars (\$3) per square yard, amounting to the sum of four thousand four hundred and twenty-eight dollars and forty-eight cents, (\$4,428.48), said repair and improvement of said street being completed and finished by the plaintiff, to wit: November 24, 1873, (with similar statements with respect to the other streets and avenues so graded and paved.)

And the declaration concluded:

“ And the plaintiff claims as due it in all the sum of one hundred and fifty-three thousand two hundred and sixteen dollars and fifteen cents, (\$153,216.15), which said account for work and material has been duly presented to the defendant and payment thereof refused, whereby an action has accrued to the plaintiff to maintain its said action against the defendant, and recover said sum of one hundred and fifty-three thousand two hundred and sixteen dollars and fifteen cents, (\$153,216.15), for which it asks judgment.

The defendant appeared and pleaded—

1. That it is not indebted as alleged.
2. Non assumpsit *infra tres annos*.
3. *Actio non accrevit infra tres annos*.

The plaintiff joined issued upon the 1st plea, and demurred to the 2d and 3d, alleging as matter to be argued in support of the demurrer “that the nature of the case is such that the statute of limitations as pleaded does not apply.

First. It is insisted by the plaintiff that the statute of limitations of Maryland (1715, ch. 23), which is in force here, cannot be pleaded to any action brought by the District of Columbia.

If the question were to be decided upon the construction of the statute alone, we should be very strongly inclined to sustain the plaintiff's position.

It is perfectly well settled that statutes of limitation which undertake to abridge or destroy the right of a suitor to bring his action at any time before payment, and are therefore in derogation of the common law maxim that “the right never

dies," are to be construed strictly, and will not be extended by implication to cases not clearly designed to be included

It is equally true that courts, to arrive at the correct meaning of a statute, will examine its language throughout, and will import words from all portions of it, to qualify the meaning of the whole. *Bode vs. State*, 7 Gill., 326.

The courts of England applied these principles to the interpretation of the statute of limitations of 32 Henry VIII, ch. 2, which limited the right of action in suits of right, or assize, &c., unless brought within sixty years from the accrual of the right. The language was most general, "*no person or persons*" shall maintain such actions; yet, as the statute in some of the sections, speaks of the possession of the claimant "or his ancestor," Sir Robert Brooke, in his Reading on the Statute, says: "A mayor and commonalty, by their name of corporation, and not by their proper names, may make title, after the statute, by eighty years past, because that is of their own possession and not of the seizen of their ancestor or predecessor, and the same of dean and chapter," &c. Brooke Stat. of Lim., 33. And this ruling is recognized as correct by all the authorities. 6 Comyn's Dig., Temps (Geo. II), p. 328.

Sir Robert Brooke died more than sixty years before the enactment of 21 James I, ch. 16. It is impossible to doubt that the legislators who enacted that statute knew of this construction which many years before had been placed upon the statute of Henry VIII, and were therefore aware that the introduction of similar expressions into the law they were about to enact would be taken by the courts as indicating a purpose to confine its application to individuals. And in this connection it is important to examine the phraseology of the 21 Jac. I, from which the Maryland statute was in great part taken.

In no part of it is there any reference in express terms or by allusion to actions by municipalities. The purpose of the act is declared to be the quieting of *men's estates*; the parties plaintiffs are spoken of throughout as "person or persons," and it is declared in the first section that "no person or per-

sons or any of *their heirs*," shall have or maintain such actions after, &c.; and such actions "shall be sued * * within twenty years next after title and cause of action first *descended* or fallen." By section 2, in case the person entitled shall be at the time the right first *descended*, &c., within the age of twenty-one years, feme coverts, imprisoned, or beyond seas, then such person and persons *and their heir and heirs*, shall have an action within the time limited after the removal of such impediments.

By section 4, in case judgment be given for the plaintiff, in such action and be reversed for error, "the party plaintiff, *his heirs, executors or administrators*, may commence a new action, &c." And by section 7 a saving is declared in favor of plaintiffs in the enumerated personal actions who may be under age, feme covert, &c., at the time such action accrued. None of the contingencies thus referred to could possibly apply to a municipality; and the personal actions enumerated, though properly such as would be brought by individuals, could not, for the greater part, be sustained by a city government.

It seems scarcely possible, with the rulings of the courts before them, that Parliament in enacting this statute in such words as these, could have supposed it was using language which would comprehend the rights of the powerful municipalities of England, then almost at their greatest estate in the kingdom—far more wealthy and in some respects more powerful than the kings themselves—without adopting the precaution of adding words, (and a few words would have sufficed), that would have placed the question beyond controversy. And it is a circumstance of the utmost significance that no case has been found, and we feel justified in saying, after examining every accessible authority, that none exists, in the English reports, where the statute of 21 Jac. I, ch. 16, has been held applicable to actions brought by a municipality.

When we examine the Maryland statute of 1715, ch. 23, its language appears to give still stronger indication that its framers never supposed they were passing a statute controlling

the rights of municipalities. Annapolis was then the only city in the province, and its charter was but seven years old. The provincial lawyers were generally well read men, who had acquired their learning by study in the Inns of London, and their influence in shaping the legislation of the province was naturally very great. They must have known that either express declaration or strong implication of intention was necessary to include a municipality in such a statute, and that if they used words which were properly applicable to individuals alone in describing the cases to be comprehended by the statute, the courts would limit its application accordingly,

They omitted from the law the prior sections of the 21 Jac. I, relating to suits respecting land, but added a section concerning bonds and other securities, not found in the usual statutes of limitation in this country. It seems to us that almost every section of the act contains language of the character we have referred to, strongly evincing the intention of the provincial legislature to confine itself to what the preamble declares to be the purpose of the act, "the quieting of the estates of *the inhabitants of the province*." In the enumeration of actions in section 2, (almost all of which are such as a municipality would be most unlikely to bring), there is an exception of such as concern "*the trade or merchandise accounts between merchant and merchants, their factors and servants, which are not residents within this province*." The act contains the saving clause as to persons under age, *non compos mentis*, &c., and a further provision as to actions on specialties "*where the principal debtor and creditor have been both dead twelve years*"—contingencies as impossible of application to a municipality, as its ability to claim through an ancestor was held to be, under the 32 Henry VIII.

And again, we are struck by the significant fact that, although the cases contained in the Maryland Reports, in which actions were brought by municipalities are numbered by the hundred, there can be found no reported case where it has been held that the statute applied to a suit brought by a municipality. In several of the cases, where the claims

of a city government appear to have been contested by distinguished counsel with the utmost vigor, if we can only rely upon the dates stated by the reporter, the statute of limitations would have been a bar; but it never seems to have occurred to the counsel that it was available as a defense. Nor has such a decision been found in this jurisdiction, where for fifty years the courts have administered this statute; during which time a multitude of suits have been brought by the cities within the District, as to some of which it is but reasonable to suppose the plea of the statute would have applied.

There is a reason of special force in favor of maintaining this position with respect to municipalities which controlled the courts in England where suits were brought by ecclesiastical corporations to recover lands which had been the property of their predecessors. It was there held that as to actions to recover such properties as these corporations were inhibited by law from alienating, the statutes of limitations could not apply; since if it were otherwise, the laws against alienation could be practically repealed, as was said, "by a side wind" by the corporations, who had only to allow themselves to be dispossessed and then neglect to bring suit for the recovery of such possessions within the time limited by the statutes. *Blanchard on Limitations*, 53.

By section 55 of the Revised Statutes, District of Columbia, the District government is prohibited from releasing the indebtedness of any corporations or individual to the District.

Nothing would be simpler than for a District government wishing to evade this prohibition, to neglect to bring suit for three years against a favored debtor, which would operate as a bar against an action brought by their more conscientious successors to recover a claim justly due the municipality.

But we are aware that in some of the States of the Union it has been held that the statute of limitations is a bar to certain descriptions of suits brought by municipalities; and in others, that it has been held to apply to all actions corporations may bring.

The decisions upon the point are confined to this country. They are not numerous and the different rulings do not appear to be based upon consistent reasoning. The cases in 66 Pa., 223, *Evans vs. Erie County*, and 4 Devereaux, 568, *Armstrong vs. Dalton*, were suits against counties, and there it was said that small divisions of the State, like counties, cannot be considered as sovereign, and are not, for that reason, entitled to avail themselves of the principle, *nullum tempus occurrit regi*. In Angell on Limitations, 6th edition, section 38, the author, after citing the case in 4 Dev., disposes of the subject in this single sentence. "In Ohio, it was held that the statute runs against a town or city," citing the case of *Cincinnati vs. First Presbyterian Church*, 5 Ohio, 298. The ruling in that case seems to be within the censure or disapproval of Judge Dillon, in the following resume of the subject in 2 Dill. on Municipal Corporations, (3d Ed.), Sec. 675. "Upon consideration it will perhaps appear that the following view is correct: Municipal corporations, as we have seen, have in some respects a double character—one public, the other (by way of distinction) private. As respects property not held for public use or upon public trusts, and, as respects contracts and rights of a private nature, there is no reason why such corporations should not fall within limitation statutes, and be affected by them. For example, in an action on contract or for tort, a municipal corporation may plead or have pleaded against it the statutes of limitations."

But such a corporation does not own and cannot alien public streets or places, and no laches on its part or on that of its officers, can defeat the right of the public thereto; yet there may grow up in consequence, private rights of more persuasive force in the particular case than those of the public. * * * The author cannot assent to the doctrine that as respects public rights municipal corporations are within ordinary limitation statutes."

This distinction is in consonance with the decision in *City of Alton vs. Illinois Transportation Co.*, 12 Ill., 59, where the matter involved was the ownership of a lot of ground

in the city of Alton. "We do not think," says the court, "the rights of the public are barred by our statute of limitations which prescribes that certain real actions shall be brought within seven years after possession taken by defendants. Without stopping to inquire whether statutes of limitations apply to municipalities, we entertain no doubt that this statute has no application to the case before us. Whatever title in these grounds may be vested in the city, she has not the unqualified control and disposition of them. They were dedicated to the public for particular purposes and only for such. She may make rules and control them but cannot alien them, and holds them in trust for the people of the State and not of Alton alone."

For the purposes of the present decision, it will be sufficient, without discussing the applicability of the first part of Judge Dillon's language to cases arising under the Maryland statute, that we adopt the concluding words of the learned judge, in which the author withholds his assent to the doctrine, "that, as respects public rights, municipal corporations are within ordinary limitation statutes."

Second. It is contended by the plaintiff, that however the law may be with respect to municipal corporations in general, a different rule should be held to apply to suits brought by the District of Columbia, because the money claimed in such cases is really due and payable to the United States. In support of this contention, it is insisted that the District as now constituted is but a department of the general Government; its chief officers appointed by the President; its sole legislature the Congress of the United States, which appropriates immediately half of its expenses, directs the collections of its taxes, and supervises the disbursement of the municipal revenues; and that while one-half the amount of whatever might be recovered in this suit would be paid directly into the national treasury, the other half would substantially enure to its benefit.

Certainly these circumstances place the District of Columbia with respect to the United States in a position strangely anomalous. They undoubtedly operate to reduce its powers

of administration much below the usual level of municipal dependence, unless they do as claimed, have the effect of communicating to it some portion of the dignity and immunities of the sovereign that has so seriously impaired its autonomy.

If the legislation of Congress had the extreme effect ascribed it by the plaintiff, the statute of limitations could no more apply to any action brought by the District of Columbia, than it could to one brought in the name of the United States itself. The courts would certainly be controlled by the status of the real party in interest, rather than by that of the nominal plaintiff.

Thus in *State Bank of Illinois vs. Brown, First Scammon*, 106, it was held that the statute of limitations could not be successfully pleaded in a suit brought by the bank, in its own name, against one of its debtors, because the charter declared that the bank should belong to the State; and hence it was considered that a debt due to the bank was really one due to the State.

But this principle cannot properly be held to embrace all suits brought by the District of Columbia, in view of the comprehensive language of the statutes establishing the form of government in force here.

The second section of the Revised Statutes relating to the District of Columbia, provides:

“The District is created a government by the name of the District of Columbia, by which name it is constituted a body corporate for *municipal* purposes, and may contract and be contracted with, sue and be sued, plead and be impleaded, have a seal, and exercise all other powers of a *municipal corporation* not inconsistent with the Constitution and laws of the United States.”

And the act of July 11, 1878 (20 Stats., p. 102), declares that the District of Columbia shall remain and continue a municipal corporation as provided in this section.

Its liability to be sued and impleaded to the full extent of other municipalities is plainly implied in the general language which creates it “a body corporate for municipal purposes;”

and we are of the opinion, in the absence of any provision to the contrary, that whatever liabilities may properly attach to municipalities in general are equally devolved upon the District government; and hence, that wherever the statutes of limitations of Maryland may be interposed to a claim of an ordinary municipality, it may be availed of against the District of Columbia.

Third. The question next arises, whether there is anything in the character of the claim involved in this suit, which renders the plea of the statute of limitations inapplicable as a bar to the action.

The claim grows out of an obligation imposed upon the companies by the United States, and assumed by them when they accepted the charters, under the authority of which alone they can claim any right to occupy the streets of the city and operate their roads.

By this requirement, contained in the 4th section of each charter already quoted, the companies are bound to keep their track and the adjacent part of the street described, *at all times well paved and in good order without expense* to the United States and to the cities named.

It was one of the few conditions imposed upon them when they received their valuable franchises. It did not, *as of course*, result from the grant; for Congress might have agreed to dispense with it. Nor was it necessarily incident to the business of carrying passengers; since a large omnibus company might possibly make more extensive use of the streets in general, without incurring any liability to pay for paving any part of them. But it is wholly a statutory provision, and the liability imposed, therefore, is wholly statutory.

After the acceptance of their charters they could not be heard to object that the provision was illegal, or incapable of enforcement against them. *New York City vs. Steel Railway Companies*, 17 Hun. (N. Y.), 242.

This duty, it is alleged, they refused to perform, and the work was done and paid for by the District, which now seeks reimbursement in this action. Upon the plain words of the statute it seems clear to us it is not within

the enumeration in the first section of the act of limitations of 1715, ch. 23. It is not "an action of account," or "upon the case, upon simple contract, book debt, or account," or "of debt for lending," or of "contract without specialty," or "of debt for arrearages of rent"; nor is it one of the other enumerated actions, as "assault," &c.

If it be either of the enumerated actions it could only be an action upon one of the classes of *contract* referred to. But the suit is not brought upon a "simple contract," or "contract without specialty," upon the part of the companies to reimburse the District for the expenditure. It is based upon the obligation on their part, implied by construction of law, to repay to the District what it has expended for work they were bound by statute to perform *without expense* to the city. If this paving has caused any expense to the District their statutory obligation has been broken, and this fact furnishes the consideration and foundation of the claim for reimbursement. Apart from the obligation upon the District to take all proper care of the streets, imposed by statute, and the duty of the companies arising under their charters to see that this work is done *without expense* to the municipality, the action could not be maintained, for the unauthorized payment of money by one party for another creates no legal liability upon the latter to repay. But the right of action here grows out of and is founded upon the obligation in the charters of both the city and the companies, and the suit is an action founded upon these statutes, within the meaning of that term.

It has been held uniformly, from a period within a few years after the passage of the 21 Jac. I, that an action upon a statute was not within the limitations of that act.

This was decided in the familiar case of *Talory vs. Jackson*, Croke Car., 513, where it was held that the statute was no bar to an action of debt brought to recover a penalty imposed by 2 Edw. VI, for removing corn before setting apart the tithes. So in *Jones vs. Pope*, 1 Saund., 55, where the action was against a sheriff for an escape under the statute. 1 Rd. 2, ch. 12.

And this doctrine has been repeatedly applied by the courts in Maryland, in cases arising under the act of 1715, ch. 23.

Such was the ruling in *French vs. O'Healey*, 2 H. & McH., 145, that an action founded on a statute cannot be barred by limitations, as debt for an escape.

So in *Longwell vs. Riginder*, 1 Gill, 57, it was held that a distress for rent in arrear based upon statute is not within the statute of limitations.

And in *Newcomer vs. Keedy*, 2d Maryland, 19, it was held in 1852, on the same ground, that limitations is no defense to an action on the case against a sheriff for a false return to a *fi. fa.*, because the officer is made answerable for such misconduct by force of an ancient statute.

So it was held in *Bond vs. Harris*, 2d Md. Ch. Dec., 213, that bonds given by an heir, electing to take part of the ancestor's land and pay their shares to the other heirs, in conformity with the statute for partition of lands, are not within the Maryland statute of limitations.

So in *Pease vs. Howard*, 14 Johns., 479, which was an action on a judgment rendered by a justice of the peace, the court say: "The statute (of New York) is not a bar to every action of debt, but only to those brought for arrearages of rent or founded on any contract without specialty. Debt on indenture, reserving rent is not within the statute. The settled construction of the statute is that it applies solely to actions of debt founded upon contracts in fact, as contradistinguished from those arising by construction of law." In the present case the action is not founded upon a contract, in fact, within the meaning of the statute.

But there is a further and conclusive reason why this action should not be held to be within the statute of limitations.

The municipality is charged with the entire custody of the streets and avenues of the city, and endowed with the amplest powers to pave and repair them, to change the grades or otherwise improve them, and make all necessary regulations to this end. And it is perfectly settled that this is a continuing power to be executed whenever it shall see

fit to do so in its discretion. *Gozler vs. Georgetown*, 6 Wheat., 597; 2 Dill., §§685-6, 780, 989, 990.

It has also full power to exact from property owners adjacent to the improvement a contribution in reimbursement of the cost, in proportion to their respective properties. Before collecting these contributions the municipality usually ascertains the aliquot part to be paid by the individuals, by an assessment. Such charges or assessments are in the nature of taxes or public dues, respecting streets and avenues, which are *the common property* held for public use in trust for the body of the people, and are not owned by the municipality nor alienable by it, as a city may under certain circumstance sell the *public property*, and place the proceeds in the public treasury.

The imposition of such assessments is in fact the levy of a tax and is made in the exercise of the taxing power. *Mayor, &c., vs. Greenmount Cemetery*, 7 Md., 535.

Such assessments constitute liens upon the property of individuals subject to the charge, and are entitled to priority of payment out of the proceeds in advance of all other claims. *Fulton vs. Nicholson*, 7 Md., 107.

And such paving assessment liens have been expressly held to be unaffected by the Maryland statute of limitations. *Esbach vs. Pitts*, 6 Md., 75.

In *Hogan vs. Ingle*, 2 Cranch C. C. Reports, 355, it was decided in this District that the statute of limitations of 1715, ch. 23, is not a bar to a distress for taxes due to the corporation of Washington. And no case has been found where the plea of the statute of limitations has been held to be a bar to an action to collect public taxes except where some additional statutory provision, unknown in this jurisdiction, has been enacted to that effect.

We were referred to the cases in 41 Iowa, 184, *City of Burlington*; and *State vs. Yellow Jacket Mining Co.*, 14 Nevada, 229, as holding a contrary doctrine; but an examination of the first case discloses that the Iowa statute in words provides that the provisions of the statute of limitations shall apply to all actions brought by or against all bodies

corporate or politic, except where otherwise expressly declared, and the court held the municipality was within this express provision.

In Nevada, the statute of limitations in terms is declared to apply to all actions, whether brought by the State or individuals, and the court says the maxim *nullum tempus occurrit regi* has not been in force within that State since the adoption of the statute in question.

In some of the other States similar provisions are in force, and decisions based upon them have been carelessly considered as affecting the law elsewhere. Of course they can have no effect here, except as an evidence that in the absence of such a provision, the statute of limitations would not have extended to the cases included within the special enactment.

This court, by its decision in *Baltimore & Ohio Railroad Company vs. District of Columbia*, 3d MacArthur, 122, has recognized the binding character of claims for taxes, notwithstanding the lapse of time. In that case the railroad company sought to enjoin the District from the sale of its property for twenty years arrearages of taxes. The company had refused to pay since 1858, (twenty-two years back), when an injunction had issued restraining a sale by a collector for taxes then claimed to be due, and the subsequent acquiescence upon the part of the city was relied upon as a forfeiture "by waiver, laches, or lapse of time." This court overruled the other grounds of exemption presented by the company, and say, "in regard to the length of time for which the company should be held liable, we are of opinion that such liability reaches back for a period of twenty years from the institution of the present suit. It is a liability created by statute, and nothing short of a lapse of time sufficient to raise the presumption of payment, will exonerate the property from its liability, and that period is twenty years."

It cannot be doubted that the statute, as pleaded in this case, would be no reply to an action brought by the District on such a claim for taxes asserted against the property of a

land owner, in the absence of a statute declaring that limitations should be a bar.

Nor can it be doubted that the law would be the same if the claim sought to be enforced, instead of being an ordinary tax, were an assessment for paving against the property of a citizen.

In *Magee vs. Com.*, use *City of Pittsburg*, 46 Penn., 358, which was an action by the city to recover the amount of an assessment against the defendant for his share of the cost of certain paving paid by the city, the defendant prayed an instruction that if the paving for which the claim was filed was paid by the city more than six years before the assessment was made, the claim of the city was barred by the statute of limitations. The court refused the prayer, and this ruling was sustained by the appellate court, which says: "The statute of limitations has no application to assessments under the acts, and the objection is grounded upon a misapprehension of the powers of the legislature."

In the present case there has been no regular assessment against these companies. But the obligation imposed upon them by law, and which they have assumed by their acceptance of the charters, is to perform their contract duty with respect to the public streets without any such assessment or levy as might be required in the case of holders of property abutting on the streets improved by the District. They have bound themselves, as part of the consideration for their franchise, to pave the designated parts of the streets *for themselves*, and any previous assessment by the District would be an idle and senseless ceremony. They knew exactly how much they were required to pave, and that they were to pay for it; and they had nothing to do except to perform the work "*without expense* to the United States or the District of Columbia." The assessment could have told them nothing not already known to them; and the District of Columbia could not have made the assessment, if required to do so, without obtaining the information from the company.

These companies, therefore, occupy, as to this statutory

duty, the same position with respect to the statute of limitations, that they would hold if the amount chargeable against them for paving had been made the subject of a regular assessment, which they refused to pay, and for the recovery of which this action was brought. For those reasons, we are of the opinion that the claim as presented is not obnoxious to the plea of the statute of limitations, and we decide the demurrer is well taken to the second and third pleas of the defendant.

Fourth. Under the demurrer, we are forced to examine the entire case ; and a large part of the argument has been addressed to the question whether under the charters and other statutes there exists in favor of the plaintiffs a liability on the part of the defendant to perform the work described in the declaration.

1. It is contended on behalf of the defendants that the companies are not liable for entirely new pavements and changes in the grades ; and we are referred to the case of *Chicago vs. Sheldon*, 9 Wall., 50, in support of this position. The decision there was based upon the special circumstances of the case. The city ordinance expressly limited the liability of the railroad company in undoubted terms to keeping the track, &c., "in good repair and condition," and the court reasonably decided that the company could not be held liable for curbing, grading and paving the streets, with an entirely new pavement in the face of a contrary stipulation.

But the language is widely different here. The companies, by the 4th section, are bound to keep the tracks, &c., at all times, *well paved and in good order.*" By section 5, of the charter of 17th May, 1862, the Washington & Georgetown Railway, and section 5, of the charter of the Metropolitan Road, July 1, 1864, it is enacted, "That nothing in this act shall prevent the Government, at any time, from *altering the grades or otherwise improving all* avenues or streets occupied by said roads ; or the respective cities from so altering or improving such streets or avenues, and the sewerage thereof, as may be under their respective authority and control ; *and in such event it shall be the duty of such com-*

pany to change their said railroad so as to conform to such grade or pavement."

By section 20, of the charter of the Metropolitan Road, it is further enacted, that the said railroad company shall keep in good repair, &c., the flagstones or cross-walks leading to, upon or over their tracks at the crossings of the streets, "and shall further, whenever necessary to render such crossings dry and convenient, raise or elevate the same sufficiently for that purpose, and shall adjust the adjoining pavement so as to make it convenient for carriages to pass said crossings."

And in both charters it was provided "that the use and maintenance of the said roads shall be subject to the municipal regulations of the cities of Washington and Georgetown within their several corporate limits."

Without pausing to examine the effect of the act of June 20, 1874, and other statutes on the subject, we entertain no doubt that these companies were bound by their charters not only to pave once the designated portions of the streets, but to repair the paving and to change the grade and lay new pavements within the prescribed limits whenever the municipality, in its discretion, should see proper to make changes in the streets, rendering such work proper to be done on the part of the companies.

The reported cases fully sustain such a construction. In *Pittsburgh and Birmingham R. R. Co. vs. Borough of Birmingham*, 51 Penn., 41, the charter required the previous assent of the borough by ordinance before the railroad could occupy its streets, and declared that the company "shall keep so much of the streets of the city and borough *as may be used and occupied by them* in perpetual good repair at the proper expense and charge of the said company."

The ordinance of the borough agreeing that the company should occupy the streets, declared that "said R. R. Co., in addition to other requirements of their charter shall *keep Carson street in perpetual good order and repair, from curb to curb its whole length*; from the time of accepting this ordinance."

These additional requirements were held by the court of

appeals of Pennsylvania to be binding upon the company, although onerous and inconsistent with those prescribed by the charter, which gave no authority to the borough to add any further conditions, but merely requires its previous assent before the railroad could occupy the streets.

But in the present case Congress distinctly required, and the companies as distinctly agreed, that the use and maintenance of the road should be subject to the municipal regulations, which required the renewal of the pavement and change of the grades to conform to the changes in the other part of the street.

2d. Can an action be maintained at law to recover back what the District has been compelled to pay on the default of the companies to perform the work described in the declaration ?

Assuming the obligation to be in force, it would seem too plain for argument that a right of action in some form must exist. For we can scarcely regard as serious the contention of counsel for the roads that the only available remedy in the case of default would be an application for a mandamus to compel the company to do the work ; or the suing out of a *scire facias* to deprive them of their charters for neglect of their charter obligations.

A municipality that would leave the track of a railroad company refusing to comply with a required change of grade at a dangerous elevation or depression, while it was following an action of mandamus through the different courts on appeal, instead of at once performing its plain duty of making the requisite changes to insure the public safety, would deserve a punishment more severe than the inevitable public censure. It would have no option in such a case but would be forced to perform the omitted work. That the negligent party should be made to repay the expense would be only a scant measure of justice.

We will refer to a few cases in support of the right of action under such circumstances.

In 45 Penna., 187, *Town of Phoenixville v. Phoenixville Iron Co.*, an action was brought by the town to recover from

the company the amount it had expended for the repair of a bridge crossed by the defendant's railroad and also by foot passengers, which had been built at joint expense, but which the defendant refused to repair. Judge Strong, speaking for the court which sustained the town's right to recover, notices that the defendant's charter authorized them to *construct* the bridge and cross it with their railroad, but says nothing of *repairs*; but he adds: "It is a fair presumption the legislature never intended to give away public rights or to impose burdens upon any local community without compensation. This is a continuing obligation upon the company to keep up the bridge."

In Penn. R. R. Co. *vs.* Duquesne Borough, 46 Penna., 224, the town brought an action to recover back the sum it had expended in rebuilding a bridge across a canal which had been taken by the railroad company under authority of a law of the State, which declares the company should receive this and the other public works, subject to existing contracts respecting them. The canal had erected the bridge originally, and it was insisted that the railroad, as its successor, was bound to repair and rebuild it.

The court held the action could be maintained, and in their opinion used this language: "whenever any person or corporation is bound to repair a public highway and refuses to do so, when necessary, on notice by the proper officers, having the general oversight thereof, those officers may repair it and recover the proper expense thereof in an action of assumpsit founded on the duty."

A case very much like the one before us is reported in 44 Wisconsin Reports, 238, City of Ocató *vs.* Chicago and Northwestern R. R. Co. By the general statutes a corporation making a railroad is required to restore any street it may pass through, to its former condition and thereafter maintain the same in such condition against any effects thereafter produced by the railroad. Nothing is said in the law as to who should defray the cost of the repairs, nor of any action to recover their cost. The defendant after constructing its road through the city, though requested by the

authorities; neglected to restore the streets and sidewalks to their former condition. The common council, which under the charter had full authority over the streets, procured the necessary repairs to be made and the city paid for them, and it was held it could recover from the railroad company all reasonable expenses so incurred.

3d. The remaining question relates to the form of the declaration, which we must examine under the demurrer to the plea.

There seemed to exist some uncertainty in the minds of the counsel as to the precise nature of the declaration. The first plea of the defendant, which is *nil debet*, seems to have assumed the action to be *debt*, to which that plea is the general issue, while it is not applicable to an action of *assumpsit* or on the case. It is also laid down that *nil debet* is almost the only plea used *in debt on statutes*, whether *quittam* or otherwise. 2 Evans' Harris, 94.

We think a recovery in the present case should be sought in an action of *assumpsit* founded upon the statutory obligations of the charter.

This form of action seems more appropriate than *debt*, because the latter lies for a sum certain, whereas the recovery here should be for such reasonable sum, to be ascertained by a jury, as the work done was really worth. Although the companies are alleged to have neglected to perform their duty in the premises, this would not authorize a recovery against them for the actual sum paid by the District, if the jury should think this was an extravagant amount, which the officers recklessly expended in the work, without reference to its true value. As in the case cited from 44 Wisconsin, the recovery should be limited to *reasonable expenses* incurred by the city. The jury in that case rejected one of the items of the account claimed by the city as not a proper charge against the said railroad company under the circumstances.

The case in 46 Penna., was in *assumpsit* founded on the duty arising out of the statutory obligation of the railroad company to keep up the canal bridge.

In *Ott vs. Chapline*, 3 H. & McH., 322, an action of assumpsit was sustained, brought by a collector, who having taxes to collect from the defendant omitted to levy them, and having paid the amount over to the public brought his action for money paid at the defendant's request.

In the same volume, at page 4, is to be found the very instructive case of *Gash vs. Taylor*. The plaintiff, the sheriff of Harford county, had paid into the State treasury, in settling his accounts, the amount of the treble tax required to be paid by the defendant as a non-juror for the years 1777-78-79; and in 1790 he brought an action of assumpsit in the general court to recover back the amount thus paid. The defendant asked an instruction that there could be no recovery, notwithstanding the payment, unless it was shown that the payment was at the instance and request of the defendant. This prayer was refused by the court, and the plaintiff recovered.

It is worthy of remark here, that although the claim in that case was long out of date and based upon a claim of treble taxes created by a law made only for the exigency of the war, long since closed, the plea of the statute of limitations was not interposed.

In *Mayor, &c., of Baltimore vs. Howard*, 6 H. & J., 383, the city brought assumpsit to recover a sum of money due for paving taxes imposed by the city on the defendant. It was held, the action would lie, whether the act authorizing the tax gave a particular remedy or none, upon the principle that where a law gives a claim to one against another, it raises an implied assumpsit or legal obligation to pay; and that where a remedy by distress or action of debt is plainly given, it is only cumulative, and does not take away the action arising by implication, on the legal obligation to pay a claim created by law.

So in *Dugan vs. Margave*, 1 Gill & Johnson, 499, the court sustained the right to recover in assumpsit for taxes levied under the city charter, and which the collector had lost the right to collect by distress, by his neglect in giving the notice required by law. "The imposition and assessment of a tax

by the Mayor, &c., in pursuance of the charter, creates a legal obligation to pay such tax, on which the law raises an implied assumpsit by the person taxed."

The tax in this case was levied in 1817, and the case was tried in the appellate court. It was argued by able counsel for the defendant, but the statute was not pleaded.

And in *Clemens vs. Mayor, &c., of Baltimore*, 16 Md., 259, it was held that a claim for paving taxes assessed under a statute, might be recovered in an action of assumpsit.

The declaration in its present form, must be held to be in debt, and should be changed to assumpsit. It should also charge that the sums paid and now sought to be recovered back were what the work was reasonably worth; and it should set forth the other sections of the charter which require the companies to conform their track to the grade of the street, and should refer to the provision that the road shall be subject to the municipal regulations.

Demurrers of plaintiff to defendants' second and third pleas sustained, with leave to the plaintiff to amend its declaration.

JOHN W. THOMPSON

vs.

ALEXANDER R. SHEPHERD.

{ Decided January 18, 1882.
{ The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

1. An instrument which is void as a contract may be used as evidence of a collateral fact, as, for example, of an acknowledgment of a subsisting indebtedness.
2. An acknowledgment of indebtedness, in order to raise an implied promise which will take a case out of the statute of limitations, must be made in such form or under such circumstances as to import a willingness to pay; but such willingness need not be expressed in terms.
3. An acknowledgment of indebtedness is not defective on the ground of uncertainty as to the amount due, because it is shown to have admitted too large an indebtedness, and to be subject to reduction on the part of the debtor.
4. A case stated in which the court finds a sufficient acknowledgment of indebtedness to prevent the bar of the statute.

THE CASE is stated in the opinion.

MERRICK & MORRIS for plaintiff.

WM. F. MATTINGLY and A. C. BRADLEY for defendant.

Mr. Justice JAMES delivered the opinion of the court:

This suit was brought on March 11, 1880. In the first and second counts, respectively, of his declaration, the plaintiff sets out two promissory notes given by the defendant to the plaintiff on March 10, 1873; one for \$7,000, due March 13, 1875, the other for \$8,000, due March 13, 1876; and he adds the common money counts. To each of these the defendant pleads that the alleged cause of action did not accrue within three years before this suit.

At the trial the plaintiff offered in evidence these notes and a deed of Shepherd and wife, of the same date, conveying to William Thompson certain real estate in trust to secure the payment of these notes; and then for the purpose of showing that, within three years before this suit was brought, the defendant had acknowledged the notes to be a subsisting indebtedness which he promised to pay, he offered in evidence, having first proved its execution by the parties whose names are attached to it, the following writing:

"In consideration of the indebtedness described in the deed of trust to William Thompson, trustee, (further designating the same by reference to the land records) the demand and claim of A. C. Bradley, to the use of A. R. Shepherd and others, against the United States, for the use and occupation of the premises No. 915 E street, northwest, and all the proceeds thereof and the moneys derived therefrom, are hereby pledged and made applicable to the payment of said indebtedness, with interest thereon at the rate of eight per cent. per annum until paid. And it is hereby covenanted and agreed that any draft or check issued in payment or part payment of said claim shall be indorsed and delivered to the trustee named in said trust, and the proceeds thereof less all proper costs and charges, be applied to the payment of the said indebtedness, with interest as aforesaid, or to so much thereof as the sum or sums of money so received is or are sufficient to pay. Witness our hands this 21st day of June, 1877." Signed A. C. Bradley and Alexander R. Shepherd. To this was subscribed the following: "The undersigned, trustees, hereby consent and concur in the above assignment. George Taylor, trustee, Samuel Cross, trustee, Peter F. Bacon, trustee." This paper was excluded and the plaintiff took exception.

By the second bill of exceptions, which incorporates the first, it appears that a deed by Shepherd and wife to Taylor and Cross and Bacon, conveying all of Shepherd's property, except his interest in the assets of A. R. Shepherd & Co., in trust for the benefit of his creditors, was offered by the plaintiff and admitted in evidence, and that the above paper was again offered and again excluded, whereupon the plaintiff took exception. This deed of trust explains the assent of Taylor and the other trustees to the so-called assignment.

It is claimed on the part of the defendant that the excluded paper was an attempted transfer of an interest in a claim against the United States, and was, therefore, void by the operation of section 3477 of the Revised Statutes; and that, being void as a transfer, it could not be offered as a paper containing an acknowledgment of a subsisting indebtedness.

Without examining the question whether it falls within the ruling of *Spofford vs. Kirk*, 97 U. S., 484, and *Goodman vs. Niblack*, 102 U. S., 556, we shall consider whether, if admitted to be void, so far as it is a transfer of an interest in a claim against the United States, it is therefore inadmissible as evidence of an acknowledgment of indebtedness and of a promise to pay that indebtedness.

The defendant's position is that, even if the language of this paper would be construed as such an acknowledgment and promise, if found in an instrument which was valid in all respects, it can have no such force when coupled with an invalid transfer of an interest in a claim against the United States. We have found no foundation for such a proposition. If the acknowledgment and promise can be gathered from the instrument and are not made dependent upon the provisions relating to the transfer, there is no reason why the paper may not be used as evidence of these facts, notwithstanding the law forbids it to be enforced as a contract for some other purpose. Starkie, (*Ev.*, Vol. 2, p. 1333), says: "An unstamped contract, containing directions to an agent, is evidence to prove those directions. And although an instrument be inadmissible as evidence for want of a stamp, yet the court may look at it for collateral purposes." After some conflict of decisions in England, this principle may be said to have been settled by the case of *Evans vs. Crothers*, 1 De Gex, M. & G., 572. If this course is allowable under a statute which aims to derive revenue from evidence, it certainly must be proper under a law which has no special bearing on evidence and only seeks to suppress the particular evil of certain embarrassing transfers. As the Supreme Court intimated in *Goodman vs. Niblack*, the operation of this statute is not to be carried beyond the evils to be remedied; and the operation here insisted upon would, after defeating the transfer, add an actual penalty for attempting it, by impairing private rights in which the Government is not interested, and even by defeating the observance of moral obligations. The public interest can be protected without this private mischief.

As we do not think this objection is tenable, we proceed to consider whether the paper in question actually contains a substantive acknowledgment and promise to pay. To this question certain tests must be applied.

The Supreme Court of the United States has several times considered what kind of acknowledgment will take a case out of the statute of limitations. In *Clementson vs. Williams*, 8 Cr., 72, the Chief-Justice, delivering the opinion of the court, said: "This acknowledgment goes to the original justice of the account. But this is not enough. * * * It is not sufficient to take the case out of the act that the claim should be proved or acknowledged to have been originally just; the acknowledgment must go to the fact that it is still due." In *Wetzell vs. Bussard*, 11 Wh., 309, the court held that "an acknowledgment which will revive the original cause of action must be unqualified and unconditional. It must show positively that the debt is due, in whole or in part. If it be connected with circumstances which in any way affect the claim, or if it be conditional, it may amount to a new *assumpsit*, for which the old debt is a sufficient consideration; or if it be construed to revive the original debt, that revival is conditional; and the performance of the condition, or a readiness to perform it, must be shown."

After stating these decisions, Mr. Justice Story, delivering the opinion of the court in *Bell vs. Morrison*, 1 Peters, 351 (362), said:

"We adhere to the doctrine thus stated, and think it the only exposition of the statute which is consistent with its true object and import. If the bar is sought to be removed by the proof of a new promise, that promise, as a new cause of action, ought to be proved in a clear and explicit manner, and be in its terms unequivocal and determinate; and if any conditions are annexed, they ought to be shown to be performed.

"If there be no express promise, but a promise is to be raised by implication of law from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a previous, subsisting debt,

which the party is liable and willing to pay. If there be accompanying circumstances which repel the presumption of a promise or intention to pay, if the expressions be equivocal, vague and indeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways, we think they ought not to go to a jury as evidence of a new promise to revive the cause of action."

Finally, in *Moore vs. Bank of Columbia*, 6 Peters, 86, (93), Mr. Justice Thompson, delivering the opinion of the court, said :

"The principle clearly to be deduced from these cases is, that, in addition to the admission of a present subsisting debt, there must be either an express promise to pay, or circumstances from which an implied promise may fairly be presumed."

Notwithstanding these repeated explanations of the statute, it must be admitted that the explanations themselves are expressed in terms which excuse the difference of counsel as to their precise meaning. We have, therefore, to state our own interpretation of Mr. Justice Story's words. We hold that the rule, as laid down by him, does not require that *willingness to pay* should be expressed in terms in addition to the *acknowledgment*. It is sufficient that the form of the acknowledgment, or the circumstances surrounding it, indicate that the acknowledgment meant that the party was willing to pay. When this is indicated by either of these means, the law will imply a promise to act upon that willingness. If, by either of these means, an unwillingness to pay is conveyed, the law certainly will not imply a promise.

We think the paper before us contains an acknowledgment which, taken by itself and as a matter of interpretation, satisfies this rule. It speaks of the indebtedness described in the deed of trust to William Thompson, which was in evidence, as constituting the consideration for the particular promises and the pledge which follow. Next it proposes that this indebtedness shall carry interest at the rate of 8 per cent. per annum "until paid ;" thus extending that rate

beyond the time provided by the notes. Surely such language cannot be said to lack any element of an acknowledgment that the original indebtedness still subsisted. A consideration must be something which has *present* vitality and force; and a once existing indebtedness cannot be described as a consideration, even though the promise based on it be void, without involving a declaration that it still subsists as an indebtedness, and that it is one which the party is willing to observe. But something more appears in this paper. It provides that interest upon this indebtedness, at a certain rate, shall run *until the indebtedness is paid*. This provision not merely imports, it expresses a willingness to pay. We have no doubt, then, that the language of this paper, considered as a matter of interpretation, contains an acknowledgment that the original indebtedness described in the deed of trust to William Thompson is a still subsisting indebtedness which the party is liable and willing to pay; and that from such an acknowledgment the law must imply a promise to pay.

But it is argued on the part of the defendant, in view of what was said in *Bell vs. Morrison* in reference to the effect of circumstances to repel an inference of intention to pay the debt, that there are in this case circumstances which control the meaning of the words of this paper and explain its intention; and that these circumstances repel the inference that defendant was willing and intended to pay his indebtedness generally. The fact that he had conveyed all his property, except his interest in a certain partnership, in trust for the benefit of his creditors, and that he had reserved a right to control and apply that property to the settlement of his debts—a provision said to be referred to by the act of the trustees in assenting to the proposed application of the claim against the United States—has been pointed out as a circumstance which shows that, in making this paper, the defendant intended only to exercise this reserved power to *apply his property*.

It is insisted that this so-called assignment was made in execution of that deed of trust, and that therefore its in-

tendments must be drawn from and limited by the purposes of the deed of trust. It is argued that when thus considered, the acknowledgment found in this paper cannot be held to import a willingness to pay generally, but must be held to import merely a willingness to apply property, in pursuance of the power reserved in the trust; and that an acknowledgment and willingness thus limited affect the implication of promise; in other words, that the only promise which the law can imply from such elements is a promise to apply property in the manner provided by the trust, not a promise to pay the debt generally. We have not failed to give serious attention to this ingenious and very acute proposition; but we think that, in appealing to the effect of repelling circumstances, counsel have omitted to observe that two other circumstances must be taken into the account. This paper provides, as we have already pointed out, that interest at an increased rate is to be reckoned on the debt. Now such an addition to the principal debt would be utterly unmeaning and even absurd, if the intention was merely to apply certain property in pursuance of the power reserved in the deed of trust, when it was understood that the property so to be applied would not even pay the principal debt without interest. It was to an account thus made up that payment was to be applied; and, according to the ordinary rule, it would be applied first to the extinguishment of interest and then to the principal debt. Now, such a method of payment and application is precisely what happens when payment is made on an interest-bearing debt which is not within the statute of limitations, and that fact indicates that the defendant intended to put the transaction upon the footing, in all respects, of a payment upon an indebtedness not affected by the statute of limitations, but subsisting and to be paid like any other debt. Why a method of treating the debt which involved rests for interest, and the running of interest until final payment, should be adopted without intending its usual consequences and implications, we are unable to perceive. The other circumstance is, that this indebtedness was fully secured, as we must suppose, by the

deed of trust to William Thompson, under which the plaintiff had power to compel a sale and to enforce full payment. This circumstance against which, as there is evidence to show, the defendant was anxious to provide, furnishes a reason for inferring that he acted upon a willingness to pay the debt generally; and for construing this proposed application of property, not as a mere application of trust property, in accordance with a power reserved in the trust, but as a step toward the payment of his indebtedness generally; a step which he was the more willing to take because it would save from sacrifice the property which had been conveyed to secure that debt.

There remains to be considered one more objection to the acknowledgment contained in this paper. It is alleged that the notes described in the deed of trust, to which it refers, were at that time subject to credits; that the balance due was, as a matter of fact, unascertained, and that therefore the acknowledgment was only an admission of *some* indebtedness, not of any particular indebtedness. It is claimed, on the authority of *Bell vs. Morrison*, that for that reason the acknowledgment was insufficient to take the case out of the statute of limitations.

In that case Mr. Justice Story said: "The evidence is clear of the admission of an unsettled account, as well from the letters of Butler, as the conversation of Morrison. The latter acknowledged that the partnership "was owing" the plaintiff; but as he had not the books, he could not settle with him. If this evidence stood alone, it would be too loose to entitle the plaintiff to recover anything. It is indispensable for *the plaintiff* to go further, and to establish, by independent evidence, the extent of the balance due him, *before there can arise any promise* to pay it as a subsisting debt. The acknowledgment of the party, then, does not constitute the sole ground of the new implied promise; but it requires other extrinsic aid before it can possess legal certainty. Now, if this be so, does it not let in the whole mischief intended to be guarded against by the statute? Does it not enable the party to bring forward stale demands after a lapse of time,

when the proper evidence of the real state of the transaction cannot be produced? Does it not tend to encourage perjury, by removing the bar upon slight acknowledgments of an indeterminate nature? Can an admission that something is due, or some balance owing, be justly construed into a promise to pay any debt or balance which the party may assert or prove before a jury?"

It is here pointed out that the implication of a new promise by Morrison would have to rest, not upon anything admitted by him, or upon proof of anything to explain what his admission meant, but upon proof *added to and wholly independent of* his admission. But no such feature appears in the present case. The plaintiff in this case is not put to the necessity to piece out or add to the defendant's acknowledgment that the indebtedness consists of the three notes described in the deed to William Thompson, by proving that less is due, and just how much less. That proof is no part of plaintiff's case; it is matter of defense. An acknowledgment of too much is not vague and uncertain in itself; nor is it rendered uncertain when the defendant shows in his defense that he had acknowledged too much, and that he is entitled to credits. If the acknowledgment in *Bell vs. Morrison*, instead of being an admission that there was an unsettled account, and that something was due on it, had been in this form: "I acknowledge that the account *as it appears on your books* is a still subsisting indebtedness," it is plain that the Supreme Court would not have held that it could not support an implied promise, because it appeared on the trial that Morrison was entitled to credits not mentioned in those books. The promise would have been held to be definite and certain, but not binding to the full amount acknowledged. We hold, then, that this objection of uncertainty in the acknowledgment is not tenable.

As we are of the opinion that a sufficient acknowledgment of a subsisting indebtedness is disclosed by the paper which was excluded at the trial, and that this acknowledgment was not made dependent upon the provisions of that paper relating to the claim against the United States, but may be

regarded as substantive, we have not deemed it necessary to consider whether the proposed transaction falls within the operation of section 3477 of the Revised Statutes, and is void as a transfer of an interest in a claim against the United States. It is unnecessary to consider this question, unless the admission of the acknowledgment in evidence amounts to a substantial acknowledgment of the whole instrument, and we think that no such result is involved.

For these reasons we are of opinion that the paper offered by the plaintiff tended to prove an acknowledgment that the debt sued on was a subsisting debt, from which the law would imply a promise to pay it; and that it was error to exclude such evidence.

Judgment below is accordingly reversed.

RICHARD T. MERRICK AND THOMAS J. DURANT

vs.

DE WITT C. GIDDINGS.

AT LAW. No. 19,086.

{ Decided January 18, 1883.

{ THE CHIEF JUSTICE and Justices MACARTHUR and JAMES sitting.

1. Plaintiffs having rested the case, the court instructed the jury that, upon the whole evidence, their verdict should be for the defendant. To which instruction the plaintiff reserved an exception, but the bills of exception, which were made part of each other, did not state in terms that they contained the "whole" of the evidence admitted at the trial. There was a statement, however, that "after the evidence had been given, as set forth in the foregoing bills," the plaintiffs rested their case.

Held, That the last statement may be accepted as equivalent to a statement that the bills contained the "whole" of the evidence. *Held, also*, That to presume that other evidence was given by the plaintiff would be to presume against the decision of the court; in other words, that error had been committed, which is not admissible.

2. The same bills of exception described the evidence only as "tending to show."

Held, That the instruction to the jury to find for the defendant, answered the purpose of a demurrer to the evidence, and must be tested by the same rule, viz., that a demurrer to evidence admits not only the facts stated therein, but also every conclusion which a jury might fairly and reasonably infer therefrom.

3. If A promises B to hold and not to pay over to C a fund belonging to C, until certain fees due to B from C shall be paid out of it, but does pay over the same to C before those fees are paid; and B, knowing that fact, makes a settlement with C, giving a receipt releasing C from further claim:

Held, That if A's promise was binding, he was liable only for such injury as B might suffer by reason of his consequent inability to obtain his fees from C, and that B's settlement and release of C released his right of action against A for injury suffered by reason of A's turning over the fund.

4. If A is under a legal obligation to do a certain act for B, a promise by C, a third party, to A in consideration of A's performance of that act, is not binding, because such performance of an act which A was already bound, though not to C, is not a valuable consideration for C's promise.

5. When it is claimed that a promise is supported by a past consideration it must be shown, as a matter of fact, that the promise was made in respect of that consideration.

6. When it is claimed that defendant's promise was made in consideration of past services rendered by the plaintiffs at defendant's request, it must appear that those services were in fact rendered in consequence of the defendant's request.

7. Where a thing previously done by the plaintiffs, at the request of the defendant, is a consideration from which the law implies a promise, a subsequent express promise, based upon the same consideration, different from, or in addition to, that which the law implies, is *nudum pactum*.

8. Where A promises B to do something for the benefit of C, B may release A from that promise at any time before C makes himself a privy to it by adopting B's act of obtaining the promise.

THE CASE is stated in the opinion.

JOHN SELDEN for plaintiffs.

F. P. CUPPY and JAMES COLEMAN for defendant.

Mr. Justice JAMES delivered the opinion of the court.

The declaration in this case alleges, substantially, that the plaintiffs were retained by the State to aid by (373); legal proceedings, mainly before the Supreme Court (373). In United States, in the recovery of certain bonds, cestab-proceeds thereof, in the possession of certain persons v out right, and belonging to said State, upon a contract for compensation of twenty per centum of the amount of to it of the said bonds or proceeds as might, by means of owed aid, be in any way recovered by said State; that where plaintiffs were acting under that retainer and conduct to those proceedings, the defendant, with plaintiffs' consent was retained by said State as her other and further attorney and counsel, but upon a separate and additional compensation

tion to be paid him, to aid in the recovery and collection of said bonds or proceeds; that afterwards, and while plaintiffs and defendant were respectively so employed, the defendant, with the consent of said State, and in consideration that plaintiffs would, by means of their legal proceedings, cause the title of said State to said bonds to be therein adjudged and decreed; but would, with the consent of the State, refrain from any attempt to reduce them into possession, and suffer the defendant with like consent, to reduce them into possession for said State, agreed with plaintiffs that he would retain for their sole use, and pay over to them, out of any of the said bonds or proceeds thereafter collected or recovered by him, as such other attorney, into his actual possession, twenty per centum thereof; that plaintiffs, with the consent of the State, and by means of their proceedings before the Supreme Court, did procure the title of the State to be adjudged as required, and did refrain as agreed, and did, with like consent, permit defendant alone, as such other attorney, to reduce said bonds into actual possession for the State; and defendant did, by means of the adjudication procured by plaintiffs, and by force of such refraining and possession of the plaintiffs, recover into his actual possession for the said State, proceeds of said bonds to the amount of \$339,240.12, but did not retain for the use of, or pay over to the plaintiffs twenty per centum, or any part of

1. ^{Pl.} upon proceeds, to the damage of plaintiffs in the sum of ^{To wh.} To this are added the common counts for money bills of state if by defendant to plaintiffs, and money received by admittant for the use of plaintiffs.

^{the ev} ^{plaint} the sake of more intelligible brevity, it may be re-
Held, T. that the cause of action set forth in the special
^{ment} ^{also,} is a breach of defendant's promise to retain and pay
^{would} to plaintiffs, out of moneys which should be, and which
^{that}

2. ^{The} ally were collected by him, the fee which the State of
^{to s'} *Held,* as had agreed to pay them; the consideration for this
^{san} ^{stat} ^{reas} promise being the performance of certain services by them, their forbearance to perform themselves, and their suffering defendant to perform certain other services.

Four bills of exception were signed at the trial, but all of them are, in proper form, made part of the last one, and the hearing in this court has been upon the latter only. It shows that "after the evidence had been given as set forth in the foregoing bills of exception, * * * the plaintiffs announced that they rested their case. Thereupon the defendant prayed the court to instruct the jury that upon the whole evidence their verdict should be for the defendant." The bill further sets forth certain reasons on which the court based its conclusions, and then adds: "And the court, therefore, gave to the jury the instruction prayed, and the jury, under instruction, returned a verdict for the defendant."

It is not stated in terms that the bills of exception contain the "whole" of the evidence admitted at the trial; but a statement that the plaintiffs rested their case "after the evidence had been given as set forth in the foregoing bills" may be accepted as equivalent. Besides, a presumption that other evidence was given by the plaintiffs would be a presumption against the decision of the court; in other words, that error had been committed; and this is not admissible. The bills of exception describe the evidence, of course, only as "tending to show;" but the instruction to the jury answers the same purpose as a demurrer to evidence, and should be tested by the same rule. "A demurrer to evidence admits not only the facts stated therein, but also every conclusion which a jury might fairly and reasonably infer therefrom." *Parks v. Ross*, 11 How., 362, (378); *Richardson v. The City of Boston*, 19 How., 263, (268). In accordance with this rule we have to state the facts established at the trial.

At the beginning of the late war the State of Texas was the holder of certain bonds which had been issued to it by the United States under the act of Congress approved September 9, 1850, (9 Stat., 446.) During the war these securities were transferred by a certain military board to certain persons, for the purpose of enabling the State to carry on hostilities against the United States, and some of them were delivered to a firm known as White & Chiles, and

still remained within the United States; the residue had been delivered to one Swisher, and were by him sent to England, where they were held, partly, by the house of Droege & Co., and partly by the Manchester Bank. The Supreme Court of the United States, by its decree in a certain litigation, established the invalidity of the transfer by the military board to White & Chiles of the bonds held in the United States. Thereupon Chiles set up title to all the bonds then held abroad, under a distinct contract made, as he alleged, between the military board and himself alone, and served notice of his pretension upon Droege & Co. and the Manchester Bank. Neither of these parties claimed any title to or interest in the bonds held by them, and the adverse claim of Chiles "constituted the single obstacle and impediment" to their recognition of the right of the State of Texas to reclaim the securities. Meantime, after the decree of the Supreme Court against White & Chiles, and in the year 1873, Mr. Davis, then governor of Texas, employed the plaintiffs to prosecute, in the United States Court of Claims, a suit against the United States, in the name of the State of Texas, for the recovery of proceeds of the bonds which had been transferred to England, upon a contingent compensation of 20 per centum of what might be recovered to the State by means of that suit. What was done with that suit beyond bringing it is not shown. Afterwards, on June 2, 1874, a written contract was made between Richard Coke, as Governor of Texas, and J. D. Giddings, and the defendant in the following words:

"THE STATE OF TEXAS, EXECUTIVE OFFICE,

"AUSTIN, *June 2, 1874.*

"These presents show that J. D. and D. C. Giddings have been appointed agents for the State of Texas to pursue, by suit, all persons having claims adverse to the State of Texas to all or any part of the United States five per cent. bonds known as Texas Indemnity Bonds, which passed out of the possession of Texas, by means of the operation of the military board; the said J. D. and D. C. Gid-

dings being also authorized to compromise with said adverse claimants upon such terms as may be approved by the Governor of Texas. It is further shown that said J. D. and D. C. Giddings are to receive, as compensation for their services, a contingent fee of ten per cent. for all sums of money recovered and actually received under their said appointment, by compromise, and are to receive twenty per cent. on all sums recovered and actually realized by suit and no more ; and said per cents. respectively, are to cover all costs and expenses and attorneys' fees, whether accrued heretofore or to be incurred hereafter, so as to give the State of Texas all of the money so to be obtained, save and except the ten per cent. and twenty per cent. aforesaid.

"Signed by both parties, the 2d day of June, A. D. 1874.

" RICHARD COKE,

" *Governor of Texas.*

" J. D. and D. C. GIDDINGS.

" Witness :

" GEORGE T. DASHIELL.

" W. W. SEUREY."

This contract was made by J. D. Giddings during the absence of the defendant, who, upon his return, surrendered it to the governor, and on the 13th day of October, 1874, the following was endorsed thereon by the governor :

" EXECUTIVE OFFICE,

" AUSTIN, Oct. 13, 1874.

" Whereas apprehensions have been expressed by J. D. and D. C. Giddings that, in consequence of outstanding contracts heretofore made with other attorneys, under which contingent fees are claimed, that if said claims are sustained the said Giddings might become liable to the State for any excess thereof above the 10 or 20 per cent. stipulated in the within contract ; now this endorsement is made for the purpose of declaring that no such liability by the said Giddings in said event was intended or contemplated ; and as, under outstanding contracts aforesaid, the per cent. for fees may

equal or exceed that stipulated for that purpose in this contract, it is hereby declared that said Giddings shall be paid in that event a reasonable per cent. of the amount realized by them on compromise, which shall be a just compensation for their services.

" RICHARD COKE,
" Governor."

It should be observed here, in reference to the question what attorneys or counsel were in fact employed, and were therefore referred to in these papers, that, neither on the 2d of June, 1874, the date of defendant's original contract, nor at any time afterwards, were any others acting on behalf of or known to the State of Texas, in respect of these bonds, or of any proceeding affecting them, than the plaintiffs and J. D. and D. C. Giddings. On that date, June 2d, 1874, Governor Coke communicated to the plaintiffs his desire to appoint an agent for the State in respect of the bonds, provided it could be done without consuming too large a proportion of what might be received in attorneys' fees, and his further wish that the Giddings might co-operate with the plaintiffs in securing a recovery for the State ; and on the 3d day of the following September he advised the plaintiffs that, though the Giddings had been so appointed, with power to compromise and adjust controversies relating to the bonds, "they were but the outside aids of the counsel conducting the litigation, and were not designed to vary or interfere with the prosecution of such litigation by such counsel."

Up to this point there is no evidence of any other employment of plaintiffs than that under the contract with Governor Davis, to prosecute in the Court of Claims the suit against the United States for the recovery of the proceeds of the bonds, upon a contingent compensation of 20 per cent. of what might be recovered *by means of that suit*. These communications from Governor Coke recognize continued employment, and it may be claimed that they are evidence from which the jury might fairly have inferred a

new and different employment. But it is to be observed that the terms of such inferred new employment are not shown, and that there is nothing from which it can be inferred that they differed from those of the contract with Governor Davis. It must be assumed, therefore, that if plaintiffs were already employed in September to conduct any other proceeding than the suit in the Court of Claims, it was upon a compensation contingent upon recovery by *direct* effect of such proceedings. As nothing appears to have been collected or recovered in this way, neither the original employment by Governor Davis, nor such inferred new employment by Governor Coke can make any figure in this case.

But it appears that afterwards in November and December, 1874, they were specifically employed on behalf of the State of Texas by Governor Coke, to conduct other and further proceedings in the Supreme Court of the United States, for the purpose of removing and avoiding the new pretension and title set up by Chiles to the bonds held in England under the pretended contract between the military board and himself individually ; that at the time of this new employment Governor Coke was informed by the plaintiffs that nothing could be collected by process or execution upon any decree or judgment which might be obtained against Chiles under these further proceedings, but that the object and value of these proceedings would consist wholly in so binding Chiles as to prevent his further adverse assertion of claim to the securities, and in enabling the State, in consequence of such prevention, to obtain the bonds, or their proceeds, held in England. Accordingly, it was agreed in this new contract that, in case the State should succeed in obtaining the bonds so held in England, or their proceeds, by means of the aid and assistance which might be furnished through such further proceedings, about to be conducted by the plaintiffs, they should receive, for their compensation, twenty per centum of what might be so obtained by the State. Under this contract the plaintiffs did prosecute, in the Supreme Court of the United States, such further proceedings that, on the 29th day of March, 1875, by the judgment of that

court, Chiles was adjudged guilty of contempt, in setting up claim to the bonds held in England, and ordered to pay a fine of \$250, and to stand committed until that fine was paid.

Governor Coke requested the plaintiffs to communicate directly with him or with the Giddings in the course of the conduct of said business, and plaintiffs did communicate with the latter, and the Giddings were informed as to all legal proceedings taken by plaintiffs, and urgently requested the plaintiffs to take such action in the premises as would dispose of the claim set up by Chiles, so that the obstruction of that claim to a settlement with the holders of the bonds might be removed.

It next appears that the defendant, proposing to go to England, and, if no settlement could be had, to bring suits there against the holders of the bonds, called on Governor Coke for funds to pay fees and costs of suit, and declined to incur the costs and expenses of such an undertaking; when Governor Coke, replying that he had no money for that purpose, made the following proposition: "If you will go, and advance your expenses, costs, and whatever is necessary, and bring it to a close during my administration, I will see that you are paid a just and fair compensation, independent of all contracts; but if you fail, I will not agree for the State to pay anything." Upon the contract thus modified the defendant undertook the trip to Europe. On July 24th, 1875, he did go to Europe, for the purpose of effecting a settlement with the holders of the bonds; having, prior to his departure, been furnished by the plaintiffs, with a view to that end, with duly certified copies of the various proceedings conducted in the Supreme Court in relation to the bonds. He succeeded in collecting bonds, and proceeds of bonds, to an amount equivalent to \$339,240; and this collection was effected solely in consequence of the judgment obtained for the State in the Supreme Court against Chiles, for the contempt above mentioned.

Before his departure, the defendant was fully informed of plaintiff's contract with Governor Coke, and that they

claimed, under that contract, 20 per cent. of what might be collected upon the bonds in England; and both before and after his return to America, the defendant promised the plaintiffs that he would hold, and not pay over to the State or to the Governor, the fund thus collected, until that compensation due plaintiffs for their services should be paid; and he informed the plaintiffs that the Governor had given him the assurance that all fees might be paid from the fund collected, before the same should be paid to the State. A settlement, however, was made between defendant and Governor Coke, on the 21st of October, 1875, in the following manner: The Governor determined that, of the fund collected by defendant, the State should receive \$300,000, and that the residue, \$39,240, "should be dedicated and appropriated to pay all costs and charges, and all attorney and counsel fees that might be due by the State to the several counsel and attorneys engaged in the service of the State," in respect of the bonds collected; and thereupon the defendant, at the Governor's request, paid over to the State the sum of \$300,000; and, upon the defendant's request that the governor should determine what proportion of the residue the Messrs. Giddings should retain for themselves, the governor adjudged to them the sum of \$31,240, and to the plaintiffs, \$8,000. The defendant retained possession of the whole \$39,240 for some months, and then delivered \$8,000 to the governor, still retaining the residue. In the end, the plaintiffs accepted the \$8,000, and executed to the State a receipt in full for all demands against her. As counsel for the plaintiffs has suggested, the circumstances under which this receipt was required need not be stated here, since they make no figure in this case.

It is claimed by the plaintiffs that upon this evidence—which we have stated as facts only on the theory of a demurrer to evidence—two contracts are established, namely: 1st. A contract made by the defendant directly with the plaintiffs to retain and pay over to them the compensation for which they stipulated with the State; and, 2d. A contract made by the defendant in terms with the State, but for the

benefit of the plaintiffs; and that the first of these is set up in the special count, but that a recovery may be had upon either of them under the common count alone, on the ground that both have been completely executed on the part of the plaintiffs.

The theory of the first of these contracts, insisted upon by the plaintiffs, is, that the evidence has established the following facts: First, an actual promise, made by the defendant some time in the year 1875, that he would retain and pay over to the plaintiffs the compensation for which they had stipulated with the State; second, that the services rendered by the plaintiffs in the proceeding against Chiles were the consideration by which this promise was supported, and that these services were a sufficient consideration, because they constituted a benefit conferred by the plaintiffs on the defendant at the defendant's request; and third, that the promise was made with the consent of the State of Texas, to which the moneys so to be held and paid over belonged.

The evidence—and on the theory of a demurrer to evidence, the fact—was that the defendant promised that he would “*hold*” the fund collected in Europe, and “*not pay it over to the State*” until the compensation due the plaintiffs should be paid, and that he informed the plaintiffs at the same time that the governor had given him the assurance that all fees might be paid from the fund. Rec., 16. A promise to retain the moneys of the State, and a promise to pay a part of them over to the plaintiffs involve widely different degrees of control over the fund, and the difference between them is important in this case. We think that this record discloses no evidence on which a jury would have a right to find that the defendant undertook to do anything more than to hold and not pay over to the State the fund collected in Europe; and that there is no evidence of a promise to pay over to the plaintiffs a part of this fund. Clearly there is no express promise to that effect, and we think there is nothing in evidence from which such a promise can fairly be inferred. An inference that he promised to pay over to them out of this fund, the fees for which they had

stipulated with the State, without an ascertainment and adjustment of those fees between the State and the plaintiffs, would be unreasonable, for he would certainly have no right to act, in disposing of the State's moneys, upon the information given him by the plaintiffs that their compensation was to be 20 per cent. of that fund. The supposed proceeding necessarily contemplated a meeting of all the parties for the purposes of ascertainment and adjustment of the fees, and this, of itself, would define and limit the legal intent of the contract, and would show it to be a contract simply to retain the fund until the governor, by uniting with the plaintiffs in this settlement, should in effect consent hereafter that plaintiff's fees should be paid out of the fund in defendant's hands. And this again would show that the promise contemplated that such payment should really be made, not by him but by the governor of Texas. Now, if defendant's promise was simply to retain the fund, his breach of contract would consist of failing to do so, and of paying it over to the State before plaintiffs' fees were settled by the State; and he would be liable only for the injury caused to the plaintiffs by such breach. That injury must arise from their consequent inability to collect their fees from the State. They have themselves shown, however, that they afterwards settled with the State, with full knowledge of the defendant's violation of contract, and received the sum of \$8,000, for which they gave to the State a receipt, "acknowledging the same to be in full for all demands against the said State, in and about the recovery of the said bonds." We think that this settlement, although it may not affect their claim upon the other contract set up by them, does defeat any action upon this contract, as construed by us, for damages arising from defendant's failure to hold the fund until plaintiffs' fees should be paid.

X It is next insisted that the services rendered by the plaintiffs in the proceeding against Chiles constituted a benefit conferred by the plaintiffs upon defendant at his request, and, therefore, furnished a consideration which supports the subsequent promise. ✓

A somewhat curious and important question here presents itself, which does not appear to have been well settled yet. If these services were in fact the very services which the plaintiffs were already bound to perform by virtue of a subsisting contract with the State of Texas, were they capable of serving as the consideration for any promise by the defendant, notwithstanding they might result, and did result, in a benefit to him? We have examined several cases bearing upon this question. In *Shadwell vs. Shadwell*, Ex'r, 30 Law J. Rep. Com. Pls., 145, which was heard in the Common Pleas in 1860, the declaration stated that the testator in his lifetime, in consideration that the plaintiff would marry E. N., promised plaintiff in the terms contained in the following letter: "I am glad to hear of your intended marriage with E. N.; and as I promised to assist you at starting, I am happy to tell you that I will pay to you one hundred and fifty pounds yearly during my life," &c. To this were added the proper averments to entitle plaintiff to an action. The executors pleaded that, before and at the time of the supposed promise, the said marriage was, without any request on the part of the testator, but at the request of the plaintiff, agreed upon between plaintiff and E. N., of which the testator had notice; that after this agreement the marriage was actually had at the request of the plaintiff and without the request of the testator, and that, except as expressed in the letter set forth in the declaration, there never was any consideration for testator's promise. To this plea the plaintiff replied that the promise was in writing, setting out the letter in full, and averred that the plaintiff afterwards married E. N., relying on testator's promise contained in that letter. The case was heard on demurrer to the replication. It was urged on the part of the defendant that the marriage was referred to in the letter as an obligation already incurred by the plaintiff; and that, therefore, the consideration on which the testator's promise was based, was a consideration that the plaintiff should do what he was already bound to do, and that was not sufficient. Erle, C. J., and Keating, J., held that a sufficient consideration appeared. Byles, J., dissented. In delivering

the opinion of the majority, Erle, C. J., said: "The consideration must appear in the writing containing the promise, that is, in the letter of 11th of August, 1838, and in the surrounding circumstances to be gathered therefrom, together with the averments on the record. The circumstances are that the plaintiff had made an engagement to marry E. N., *his uncle promising to assist him at starting*, by which, as I understand the words, he meant on commencing his married life. Then the letter containing the promise declared on is said to specify what the assistance would be, namely, one hundred and fifty pounds per annum during his uncle's life ; * * * and a further averment, that the plaintiff, relying upon his promise, did marry E. N." Byles, J., dissenting, said: "The well-known cases which have been cited at the bar in support of the position, that a promise, based on the consideration of doing that which a man is already bound to do, is invalid, apply to this case ; and it is not necessary, in order to invalidate the consideration, that the plaintiff's prior obligation to afford that consideration should have been an obligation to the defendant. It may have been an obligation to a third person. The reason why the doing what a man is already bound to do is no consideration, is not only because such a consideration is in judgment of law of no value, but because a man can hardly be allowed to say the prior legal obligation was not his determining motive."

X The majority of the court forbore to discuss the question whether the doing of an act which the plaintiff was already bound to do was of itself a sufficient consideration for a promise by a third party, and clearly went on the ground that other circumstances were so connected with and added to this act, as to show that this was not the sole consideration. Byles, J., excluded those circumstances, holding that the consideration was reduced to this act alone, and was, therefore, insufficient.

X Two months later the case of *Scotson vs. Pegg*, 6 Hurl. & N., 295, was heard in the Exchequer. The promise there declared on was in consideration of the delivery by the plaintiffs of certain coals from their ship. The defendant pleaded

that, when he made this promise, the plaintiffs were bound by a subsisting contract with another party to deliver these coals to their order; that he had bought the coals from that party who had given an order for delivery to him; in other words, that the plaintiff was already under a subsisting obligation to another party to do just what he had done, and that, therefore, there was no consideration for his promise. This case also was heard on demurrer. It is evident from the opinions of Martin and Wilde, barons, that they assumed the existence of a further consideration beside the mere doing of an act which the plaintiff had already bound himself to a third party to do. Martin, B., said: "It is consistent with the declaration that there may have been some dispute as to the defendant's right to have the coals, or, it may be that the plaintiffs detained them for demurrage; in either case there would be good consideration that the plaintiffs, who were in possession of the coals, would allow the defendant to take them out of the ship. Then is it any answer that the plaintiffs had entered into a prior contract with other persons to deliver the coals to their order upon the same terms, and that the defendant was a stranger to that contract? In my opinion it is not. We must deal with this case as if no prior contract had been entered into." And Wilde, B., said: "Here the defendant, who was a stranger to the original contract, induced the plaintiffs to part with the cargo, which they might not otherwise have been willing to do, and the delivery of it to the defendant was a benefit to him. I accede to the proposition that, if a person contracts with another to do a certain thing, he cannot make the performance of it a consideration for a new promise to the same individual. But there is no authority for the proposition that where there has been a promise to one person to do a certain thing, it is not possible to make a valid promise to another to do the same thing." These opinions suggest two observations. When Martin, B., said that it was consistent with the declaration that there may have been some dispute as to the defendant's right to have the coals, or that there may have been a claim for demurrage,

and that the prior contract was no answer in that case, he plainly went on the ground that it was consistent with the declaration that there may have been a consideration beside the mere doing of an act which the plaintiffs were already bound to do by their contract with another party. The remark quoted from Wilde, B., indicates the same view. The other observation is, that his statement as to the possibility of a valid *promise* to a new party, that is, to the defendant, notwithstanding a prior promise to another person to do the same thing, indicates some inattention to the actual case before the court. If there had been any such promise, there would clearly have been a sufficient, because a new consideration, moving directly from plaintiff to defendant. In that case the consideration for defendant's promise would have been the performance of an obligation of the plaintiff directly to him, arising at the same time and wholly new, and not of an obligation to another person still subsisting.

Mr. Frederick Pollock, in his treatise on the Principles of Contract, (p. 163), seems to suppose that this case involved a new promise by the plaintiff, and not merely the act of delivering on the strength of defendant's promise. He says: "In the case where the party is already bound to do the same thing, but only by contract with a third person, there is some difference of opinion. But there seems to be no valid reason why the *promise* should not be good in itself, and therefore a good consideration. *It creates a new and distinct right*, which must be always of some value in law, and may be of appreciable value in fact. There are many ways in which B may be very much interested in A's performing his contract with C, but yet so that the circumstances which give him an interest in fact do not give him any interest which he can assert at law. It may well be worth his while to give something for being enabled to insist in his own right on the thing being done. This opinion has been expressed and acted on in the Court of Exchequer, (*Scotson vs. Pegg*), and seems implied in the judgment of the majority of the Court of Common Pleas some weeks earlier."

On the other hand, it had been held, more than a century

before these decisions, that even when the plaintiff "undertook," at the defendant's request, to do an act which he was already under an obligation to another party to do, the defendant's promise in consideration of that undertaking was not binding. See Atkinson vs. Settree, Willes, 482. (A. D. 1744), as explained in a note by Langdell. Langdell's Select Cases on Contracts, p. 189. Subsequently, in Herring vs. Derrell, 8 Dowling's Prac. Cases, 604, decided in 1840, it was held by Coleridge, J., that a promise made in consideration of the mere doing of an act which the promisee was already under a legal obligation to a third party to do, was without consideration.

We have found time to discover but few cases in this country touching this question. In *Davenport vs. First Congregational Church*, 33 Wis., 390, the court said: "It was proposed to show that the plaintiff agreed to surrender and discharge all his debts against the defendant providing the defendant would, within a reasonable time, pay its indebtedness to its former pastor; and the defendant accepted the proposition and, at a good deal of trouble and expense, raised the money and discharged that indebtedness. The only consideration for plaintiffs' promise, upon these facts, was the payment by the defendant of a debt justly due. It might cause the defendant some trouble and inconvenience to pay its debts, but we are not aware of any principle of law which would make such payment alone a sufficient consideration for a promise on the part of its creditor to release his claim." So, too, in *Johnson's Adm'r vs. Sellers*, 33, Ala. 265, it was held that a promise by defendant to plaintiff, made to induce the latter to comply with an existing contract between him and other persons was without consideration.

The rule established by these authorities is, that a promise made in consideration of the doing of an act which the promisee is already under obligation to a third party to do, though made as an inducement to secure the doing of that act, is not binding because it is not supported by a valuable consideration. We conceive this to be clearly true when the act done on the part of the promisee

involves nothing more than *performance of the original obligation toward the party to whom it was due*. On the other hand, if the promise be made in consideration of a *promise* to do that act, entered into directly with the promisor, as indicated by Mr. Pollock, or in consideration that some dispute is thereby determined, or that some right is waived, as suggested by the remarks of Martin, B., in *Scotson vs. Pegg*, then the promise is binding, because not made in consideration of the performance of a subsisting obligation to another person, but upon a new consideration moving between the promisor and promisee. We do not perceive that *Shadwell vs. Shadwell* or *Scotson vs. Pegg* are opposed to this view; though some observations were thrown out by the learned judges during the argument which we cannot reconcile with it, and which we cannot assent to.

We think that the consideration on which this defendant's promise to the plaintiffs is alleged to have been founded is governed by the rule which we have stated. It is claimed that the services rendered by the plaintiffs in the proceeding against Chiles, in the Supreme Court of the United States, were rendered at the request of the defendant, and constituted the consideration for his subsequent promise.

But it appears that, at the time when they are said to have carried on these proceedings at his request, they had already been retained by and were under a legal obligation to the State of Texas to perform these services; and it is not shown that they promised the defendant that they would continue them, or that they were induced by defendant's request to determine any dispute as to their obligations, or to waive any claim. In a word, no other consideration for any promise by the defendant, than the performance of what they were legally bound to perform by a subsisting contract with another party, is shown; and the plaintiffs have shown on the other hand, in their own behalf, that they actually did perform that act under their prior contract. We hold that these services could not serve as a consideration for any promise by the defendant, even if it had been made at the time of the request for their perform-

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ance. It may be added that, even if they could serve this purpose, they are not shown by any evidence to have been, *as a matter of fact*, the consideration on which the promise here insisted on was based. What the consideration for a promise was, is a matter of evidence, and this consideration is not shown to have been referred to, or to have been in the minds of the parties. We know of no principle which would have authorized a jury to assume, in the absence of affirmative proof, that some past benefit, conferred at a party's request, was intended to serve as a reason or consideration of a subsequent promise, whose terms in no way referred to it, merely because it was an event which had once happened between the same parties. The antecedents of parties are not to be sifted for a consideration.

! Again, it should appear in some way that these services were *in fact* rendered in consequence of defendant's request. If the plaintiffs were already bound by their contract with another party to perform them, and were actually performing them at the time of defendant's request; in other words, if they were already moved by a sufficient legal cause, the mere fact of a request by a new party is not evidence that they were caused by that request; and this record discloses no other affirmative evidence tending to show that the plaintiffs did in fact act upon that request. Indeed, by showing, in their own behalf, that they obtained judgment against Chiles under their contract with the State of Texas (Rec., 15), they have shown that they did not act upon defendant's request.

But if it had been shown that these services were in fact contemplated by the promisor as the consideration of his promise, and that they were in fact rendered in consequence of his request, and if it should be conceded that they might serve as a valuable consideration for some promise on his part, notwithstanding the plaintiffs were under a prior subsisting obligation to another party to perform them, we should still be confronted with the question, whether the particular promise here insisted upon can be supported by that consideration. We think that the contract here set up

cannot be built upon that foundation. If plaintiffs' services in the proceedings against Chiles can be regarded as a benefit conferred by them on the defendant in consequence of his request, and as a consideration for some promise on his part, it would follow that the law at once *implied* a promise by him (since he made no express promise at the time), to pay for the services which he thus caused, what they were reasonably worth.

The contract between the plaintiffs and the defendant in relation to those services, would in that case be complete and closed up. In that contract the services would stand as the consideration for a perfect promise, although that promise would be established only by implication. Now, it has been established that, where a past consideration, that is, a thing previously done by the plaintiff at the request of the defendant, is one from which the law implies a promise, a subsequent express promise different from, or in addition to, that which the law implies, is *nudum pactum*. Among the authorities in which this doctrine is recognized are *Brown vs. Crump*, 1 Marsh, 567; *Granger vs. Collins*, 6 Mes. & W., 458; *Roscorla vs. Thomas*, 3 Q. B., 234; and *Bradford vs. Roulston*, 8 Irish Com. L. Rep., 468. If this were not the rule there would be two distinct and perhaps antagonistic promises resting upon one consideration. We suppose that it is not necessary, in applying this principle to the case before us, to demonstrate that a promise to retain out of a fund belonging to the State of Texas, and pay over to the plaintiffs, a compensation due them from the State of Texas, is different from an implied promise of the defendant to pay the plaintiffs himself, and out of his own moneys, the value of services rendered at his request. We must hold under the authorities referred to, that plaintiffs' services cannot in this case serve as a consideration for the subsequent express promise insisted on. If a consideration at all, they had already carried one promise and will not carry another.

Finally, as to the assent of the State to this contract, by which its fund was to be disposed of. It is claimed that the

Giddings had, by virtue of their contract of June 2d, 1874, with Governor Coke, a lien upon this fund for the purpose, among others, of paying out of it the plaintiffs' fees, and that the law implied the consent of the State to an act which would execute the purpose of the lien. In this way the assent of the State to the contract under consideration is said to be made out. We think that the provision referred to never had the effect claimed for it, and that, even if it might bear such a construction it was rescinded before it could lend any support to this later contract. But as it forms the basis of the second proposition presented to us, the questions of its effect and of its rescission will be considered under that head.

This second proposition is, that a contract was made by the defendant, in terms, with the State, but for the benefit of the plaintiffs, and that by virtue of this contract he is bound to pay their fees, at least to the extent of the compensation allowed to himself.

The contract of June 2d, 1874, sets forth that J. D. and D. C. Giddings were appointed agents for the State of Texas, "to pursue *by suit* all persons having claims adverse to the State of Texas," to the bonds in question; and, after stating their compensation and authorizing them to proceed also by compromise, it provided that their percentage were "to cover all costs and expenses and attorneys' fees, whether accrued heretofore or to be incurred hereafter." It is not claimed that plaintiffs' fees had "accrued heretofore," or that any fees have been earned under the then outstanding contract with Governor Davis, made in 1873, by which they were to be entitled to twenty per cent. of what might be recovered to the State by means of the suit against the United States. The basis of their claim is the contract with Governor Coke, made in November or December, 1874. The question, therefore, is, whether the provision relating to attorneys' fees "to be incurred hereafter," meant that the Giddings were to pay out of their percentages whatever fees the State should subsequently choose to contract to pay to attorneys for services in respect of these bonds. On re-

cüring to the first clause of the agreement, we find that they were to pursue *by suit* all persons having adverse claims. It was contemplated, then, that they should employ attorneys, and to the fees of these attorneys, at least, the clause relating to attorneys' fees to be incurred hereafter, would apply. Was it understood that the same words should apply to attorneys employed, not by these agents and in suits which they should cause to be brought, but by the State; and that the compensation of these attorneys, over which they could have no control, and which might, as the compensation claimed by the plaintiffs undoubtedly would, sweep away the whole of their own percentage, should be paid out of these percentages? We think that an intention which it would be so improvident and even absurd for them to entertain, is not to be gathered from this provision, when it may be satisfied by another and reasonable application.

This is a familiar test in ascertaining the intention of statutes and contracts. It is to be observed, moreover, that this instrument provides for a particular, and what on its face would seem to be a complete agency, by means of which suits should be pursued or compromises made; and that it contains no express indication that the State intended to employ, or reserved the right to employ, any other agency, and at the cost of the Giddings. In view of this general purpose of the instrument, and of the omissions of such an express provision, we think it is inadmissible to apply the clause in question to the fees of the attorneys afterwards employed by the State, independently of the agents. We are aware that the record shows that the State did in fact afterwards make a contract with the plaintiffs for services and compensation, but that fact does not construe this agreement; it must be construed by its own terms and by the circumstances existing at the time of its execution. And if we are to look to any construction given by the parties, it appears that they both construed and modified the original contract, before the defendant was willing to act under it, by the indorsement of October 13, 1874. The terms of this

indorsement clearly indicate a purpose to prevent undue liability on the part of the agents, and to secure to them a reasonable compensation, in case their percentages should be swept away by the charges laid upon them; and yet for this purpose they provided only for the case of those percentages being absorbed by claims under "outstanding contracts." The parties plainly assumed that these were the only source of damages, and it is not intelligible that they should have understood that the object of the indorsement might yet be defeated by contracts which the State should choose to make with other persons. As this indorsement was made before the defendant would consent to act under his appointment, the two papers must be construed as one instrument; and, when so construed, they exclude any application of the clause in question to the fees of attorneys afterwards retained by the State.

But, if even the original contract had contained a promise to the State, that the Giddings would pay plaintiffs' fees, those parties had a right to modify or rescind it at any time before the plaintiffs made themselves privies by accepting and acting upon it. *Trimble vs. Strother*, 25 Ohio St., 378; *Davis vs. Calloway*, 30 Ind., 112; *Durham vs. Bishoff*, 47 Id., 211; *Thorp vs. Coal Company*, 48 New York, 257. And it appears that the State and its agents did in fact agree upon a new basis and method of compensation, while the original contract was thus open to modification, and that, under the new arrangement the defendant could have no connection with plaintiffs' fees.

It was agreed between the defendant and Governor Coke, that, if the defendant would go to England, and pay all costs and expenses incident to the collection of the bonds there held, and should collect them during Governor Coke's administration, he should have a fair compensation independent of all contracts. We think that by this arrangement the original terms of compensation were essentially altered. Under the original contract the defendant was to have reasonable compensation in case his percentages should be exhausted by the charges laid upon them; but that cumbrous arrangement

was superseded, and the defendant was now to work simply for a reasonable contingent compensation "independent of all contracts." Whatever compensation he was now to have was to come to him in that character, and of course exempt from any charge for the benefit of the plaintiffs; inasmuch as a fair or reasonable compensation subject to be consumed by charges is an unintelligible conception. With these views as to the intent of the original contract, and of the effect of the final modification, we must hold that the compensation actually received by the defendant did not constitute a fund out of which he was bound to pay fees to the plaintiffs, or money received for their use. We think, therefore, that the court below was right in directing the jury to find a verdict for defendant upon both the special and common counts. Judgment is accordingly affirmed.

JAMES N. CARPENTER vs. JOHN W. STARR.

AT LAW. No. 21,414.

{ Decided January 30, 1883.

{ The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

Defendant received from K., without fraudulent purpose towards plaintiff or circumstances to put him on inquiry, certain goods as security for money loaned. Before suit brought (replevin) the defendant had returned the goods to K. without notice from plaintiff that the goods were his. *Held*, That the plaintiff could not recover.

STATEMENT OF THE CASE.

This was an action of replevin brought to recover possession of plaintiff's property, certain jewelry alleged to have been illegally taken and detained by the defendant. The return upon the writ stated that the goods were eloigned. The facts were as follows: In the absence of the plaintiff, his wife, who had, without his knowledge or consent, gotten possession of the property sued for, pawned the same with a certain Wm. Kiskadden, as a security for money loaned.

Some time afterwards Kiskadden placed them with the defendant as collateral security for money advanced on a promissory note. Defendant took the property believing it to be the property of Kiskadden. Some time afterwards Kiskadden paid the note, and the jewelry was returned to him. Plaintiff in the meantime had ascertained that defendant was in possession of the property, and brought this action of replevin; but not, however, until after the goods had been returned by the defendant to Kiskadden.

The above facts being in evidence, the court instructed the jury that "if they believed from the evidence that the defendant received the property from Kiskadden for a temporary purpose, to wit, as security for money loaned by defendant to said K., without fraudulent purpose toward the plaintiff, or circumstances to put him on inquiry, and afterwards returned the goods to K., before this suit was brought and without notice from plaintiff that the goods were his, then they must find for defendant."

Verdict and judgment for defendant.

On exceptions to the instructions of the court the cause was taken to the General Term where, after hearing, the judgment was affirmed.

BENJ. J. DARNEILLE for plaintiff.

HAGNER & MADDOX for defendant.

THE UNITED STATES

vs.

JOSEPH RODGERS AND CRISTOPHER HUNTER.

CRIMINAL DOCKET.

{ Decided February 14, 1883.

{ The CHIEF JUSTICE and Justices WYLLIE and JAMES sitting.

1. Where the mere possession of a chattel is fraudulently obtained from the vendor by the vendee, *animo furandi*, a conversion of such chattel by such vendee is larceny.
2. The facts that a portion of the purchase money is paid by one of two vendees in collusion and receipted for by the vendor, and the chattel left in the possession of said vendee, while the vendor proceeds to another place to receive the balance of the purchase money from the other collusive vendee, do not work a transfer of the title; it remains in the vendor until the transaction is complete, and the whole of the purchase money paid; and a conversion of the chattel by the vendee in possession before the entire purchase money is paid, constitutes larceny on the part of both of such collusive vendees where they have conspired to obtain possession of such chattel by fraud or deceit for the purpose of conversion.

STATEMENT OF THE CASE.

The defendant was convicted of grand larceny.

About March 9, 1881, one William H. Peden, a farmer residing in Stafford county, Virginia, came to the city of Washington, D. C., with a mare which he wished to sell. He was approached by the defendant, Rodgers, and urged to trade; this he repeatedly refused to do, saying that he would only sell, and that for the sum of \$105 cash. The defendant Hunter, who was an acquaintance and associate of Rodgers, both being horse traders, then intervened and offered Rodgers \$100 for a horse which he (Rodgers) had in a distant part of the city, Hunter at the same time falsely stating that he was the owner of an adjacent house which he then pointed out. It was arranged that Peden should ride his mare to the distant stable where Rodgers' horse was, should there receive \$5, should then ride the horse back to the house which Hunter pretended to own and there receive from Hunter \$100. Peden rode the mare to the stable, received \$5, and gave a receipt therefor, left the mare with Rodgers at that stable, rode the horse back to the house which Hunter said he owned, could not find Hunter, and

learned that he did not own the house. He went immediately back to the stable where he had left his mare, but she had been removed. Neither Hunter nor Rodgers could be found. After search and complaint to the police, Peden found his mare at a stable in another part of the city and reclaimed her, leaving the horse, which was subsequently claimed and sold by Rodgers. Peden swore that he did not intend to part with the property in his mare until he had been paid the \$105, and it was not pretended that he regarded the horse as his property; he immediately reclaimed his mare when he failed to find Hunter at the appointed place.

To this evidence on the part of the Government the defendants demurred. Cox, J., overruled the demurrer, and upon this ruling the case was argued in general term.

A. B. WILLIAMS for the defendants:

On the *first* bill of exceptions the defendants contend that their acts as disclosed by the testimony produced on behalf of the United States do not constitute the offense of larceny, and, therefore, that their demurrer to the evidence should have been sustained by the court.

They offer the following reasons for this position:

I. That the proof shows that the element of barter and sale entered into and formed a component part of the transaction, and that title passed.

This clearly appears from the acts of the prosecuting witness, Peden, as disclosed by his own testimony.

First. Because Peden having come to this District for the purpose of selling his mare, he did agree to dispose of her for the sum of one hundred and five dollars.

Second. Because Peden did receive five dollars and did receive and take away the mare belonging to the defendant Rodgers.

Third. Because Peden did deliver his own mare to the defendant Rodgers.

Fourth. Because the said delivery of his mare by Peden to Rodgers, was absolute and unconditional, on his part, and

accompanied by the receipt of articles of true value in return therefor.

Fifth. Because the said delivery of his mare by Peden to Rodgers, and the reception of Rodgers' mare and five dollars in return therefor was at that time with the intent on the part of Peden to transfer the property therein.

Sixth. Because Peden knew at the time of the delivery of his mare to Rodgers, that he, Rodgers, received her as his own property, and that his consent thereto would be implied from his silence.

Seventh. Because, after getting the five dollars and mare from Rodgers, he, Peden, recognized his agreement with Hunter by proceeding to the place designated by Hunter with the intent to deliver to him the mare he had just obtained from Rodgers, and receive the one hundred dollars agreed upon.

II. That the proof shows that there was no felonious taking on the part of the defendants.

This also appears from the testimony of the prosecuting witness, Peden.

First. Because the defendant Rodgers was placed in possession of the mare alleged to have been stolen, unconditionally, and by the voluntary act of Peden.

Second. Because Peden failed to make a special delivery of the possession of the mare or to stipulate that she should be held by Rodgers for any period of time, or for any special purpose whatsoever.

Third. Because when Peden delivered the mare to the defendant Rodgers, he knew at the time he did so, that defendant Rodgers received her as his own, and he permitted him to do so without any expression of dissent on his part.

III. The general statement made by the prosecuting witness, Peden, "that he did not intend to part with his mare unless he got one hundred dollars in money," is not testimony tending to prove the fact, which must be affirmatively established by the United States, that at the time of delivering his mare to Rodgers, he did reserve title in himself and make a special delivery of the mare, but, it is consistent with the

fact which is established by the entire testimony, that at the time that he delivered his own mare and took the five dollars in money and Rodgers' mare, he fully believed that he would get one hundred dollars for her, on delivering her to Hunter, and that at that moment he intended that title in his mare should pass to Rodgers.

IV. The guilt of persons charged with crime cannot be made to depend upon the unexpressed mental reservations of others, but only upon their own acts and expressions uttered or adopted by them.

There have been many decisions, both ancient and modern, upon the subject of larceny, where the possession has been obtained by consent, and they may be considered as establishing the following propositions, as to title :

First. If the owner of goods part with the possession, voluntarily, knowing at the time, that the person receiving the same takes them as his own property, and he fails to indicate or to express his dissent thereto, title passes and it is not larceny, although false and fraudulent means have been used to obtain the owner's consent to the act. *Welsh vs. People*, 17 Ill., 329; *State vs. Kellog*, 26 Ohio, 15; *Lewer vs. Com.*, 15 S. & R., 93; *Elliot vs. Com.*, 12 Bush., (Ky.), 176; *Kelley vs. People*, 13 N. Y., (S. C.), 509; *Phelps vs. State*, 55 Ill., 334; *State vs. Porter*, 1 Porter, (Ala.), 118; 1 *Dennison*, C. C., 38; 2 *East.*, 668.

Second. When the owner of goods delivers the possession to another person, specially for some purpose or object, and they are subsequently by him converted to his own use, the offense is larceny. *State vs. Watson*, 41 N. H., 533; *State vs. Lindenthal*, 5 Richardson, (S. C.), 237; *Elliot vs. Com.*, 13 Bush, Ky., 176; *Smith vs. People*, 53 N. Y., 111, *Hildebrand vs. People*, 56 N. Y., 394; *Loomis vs. People*, 67 N. Y., 322; *Weyman vs. People*, 6 Thomson & Cook, N. Y., (S. C.), 696; 2 *East.*, 678, 679.

Applying the principles established by these cases it is apparent that, inasmuch as the owner of the mare voluntarily parted with his possession and delivered her to the defendant, knowing that he received her as his own, and

took the defendant's goods away with him, without making any stipulation or agreement concerning her, and without giving expression to any mental reservations or intentions that may have existed in his mind at the time, he consequently made no special delivery and therefore the defendants are not guilty of larceny.

GEORGE B. CORKHILL and R. ROSS PERRY, for the United States:

I. Where, by delivery, the owner of the goods passes not only the possession, but the right of property, there is no larceny.

II. But where the mere possession has been obtained *animo furandi* or fraudulently, then any act indicating conversion constitutes larceny.

Did Peden, in delivering possession of his mare to Rodgers intend to vest him with the ownership of the mare until he had been paid for her? He swears that he did not so intend; it is not reasonable to suppose that he did so intend; he was a stranger here and the defendants were strangers to him; it is not probable that he would have parted with the property in his mare until he had been paid relying simply upon the good faith of these strangers. His acts show that he did not so intend, for his first step was to reclaim his mare; the defendants knew that he did not so intend, for they immediately removed and, as they thought, concealed the mare, and then vanished.

The following cases are referred to as illustrating the distinction between a mere delivery of the possession, a conditional delivery and the absolute transfer of ownership: *Rex vs. Aikles*, 2 East. P. C., 675; ———, 1 Leach, C. C., 294; *Rex vs. Campbell*, 1 Moody, C. C., 179; *Rex vs. Small*, 8 Car. & Payne, 46; *Regina vs. Webb*, 5 Cox C. C., 154; *Rex vs. Gilbert*, 1 Moody C. C., 185; *Rex vs. Pratt*, 1 Moody, C. C., 250; *Regina vs. Cohen*, 2 Dennison, C. C., 249

See also—2 Leading Criminal Cases, p. 101; 1 Whartons' Criminal Law, §§963, 966; *Stevison vs. People*, 43 Ill., 397; *State vs. Brown*, 25 Ill., 561; *People vs. Call*, 1 Denio, 120;

People vs. McDonald, 43 N. Y., 61, *Smith vs. People*, 53 N. Y., 111; *Elliott vs. Com.*, 12 Bush, (Ky.), 176.

There is apparently but little conflict between counsel for the defendants and counsel for the United States with respect to the law applicable in the premises.

It is conceded by counsel for the United States that if Peden meant to transfer the ownership of his mare by the delivery of the possession to Rodgers, there is no larceny.

It is conceded by counsel for the defendants that if Peden delivered the possession of the mare to Rodgers, specially for some purpose or object, intending to retain the ownership until the purpose was accomplished, and the mare was converted by Rodgers before such purpose was accomplished, then there is larceny. Counsel for defense, however, insist that the special purpose must be explicitly declared at the time of the delivery of the possession. Mr. Justice Cox thought otherwise and instructed the jury that it might be implied from all the circumstances of the case, and the accompanying and succeeding acts of both parties. In this he was clearly right. None of the cases cited by defendants' counsel establish that there must be a formal declaration by the one party and acceptance by the other, of the purpose of the transfer of possession.

Mr. CHIEF-JUSTICE CARTER delivered the opinion of the court.

We do not care to hear further argument in this case. We think the defendants were fairly tried and properly convicted, and that they are eminently worthy of punishment. The case, as it appears to us, was that of an inchoate sale, an incomplete delivery, and a conversion of the property by the defendants with a felonious purpose, while the sale was yet inchoate and incomplete.

The formula of the transaction, if dissected as the ingenuity of counsel in argument has ably attempted to do, might make another case. But is that the proper way to view this transaction in the light of the plain purpose of the law to punish guilt and to protect innocence?

The complaining witness came to this city with a horse for sale, of which he had fixed the price, and upon the horse-market here he met the defendants Rogers and Hunter. He was inquired of by them if he wanted to sell his horse. He replied, "Yes, I want to sell my mare for \$105 cash." Said Rodgers, "I would buy it if I could sell my horse for \$100." Hunter then and there, according to the statement of facts, said that he would pay Rodgers \$100 for his horse. "Very well," said the complaining witness, "that makes a sale of my mare for \$105."

Now counsel for the defendants has discussed the case as if this was the merest innocent, accidental, segregated action conceivable on their part; that it all happened by mere blunder; that there was no concert of action or mutual understanding between Rodgers and Hunter; if that view of the facts could be tolerated the force of the argument would be conclusive. But the case as the evidence clearly shows it, is far otherwise.

The complaining witness, a countryman, is approached by these defendants with reference to a purchase of his mare; as always happens in such cases, the consideration to be paid is not at hand, it is by mere accident a little way off, as in this instance the horse which Hunter pretended to buy of Rodgers was not at the horse market but at Rodgers' house; the countryman was invited to go there, leave his mare, bring Rodgers' horse to Hunter and receive the \$100, and he went. Hunter told him that he (Hunter) lived in and owned a certain designated house, and that he (witness) should bring Rodgers' horse there and receive his money. At Rodgers' house the saddle was taken from the countryman's mare, placed upon Rodgers' horse, which the countryman rode back to the house pointed out by Hunter; when he got there he found that Hunter did not live there and did not own the house. Hunter he could not find. He then rode back to Rodgers' house, but both Rodgers and the mare had disappeared, just as you might accidentally suspect from this series of accidents. He then began to suspect that he had fallen among thieves, and made complaint to the police

through whose assistance he recovered his mare in another part of the city.

Now does this combination of facts, this series of circumstances, justify the conclusion that these defendants acted in concert, and that they conspired to get the complaining witness' mare fraudulently out of his possession? We think that such a conclusion is irresistible.

The demurrer was overruled in the court below upon the hypothesis, as we are advised by the charge of the court, that this transaction was one and entire; that Rodgers and Hunter were in design one person, that they mutually conspired and intended mutually to reap the benefit of the conspiracy.

The ground upon which we decide this case is that here was an incomplete sale, an incomplete or conditional delivery of the thing sold; that the transaction was not ripened and fully consummated until the purchase money had been paid for the mare; that the title to the mare did not pass until the purchase money had been paid, and was not intended by the vendor to pass until then. The fact that Rodgers' horse constituted one part of the consideration, and the five dollars paid by Rodgers another part of the consideration, and that the horse was saddled to convey the vendor to the place of payment of the balance of the purchase money, do not make it a complete transaction; it could not become such until the purchase money had in fact been paid. We hold that the right of property in the title to the mare remained in the vendor until the time of the payment of the purchase money, and as the purchase money was never paid the vendor never parted with his title to his mare.

If the question were *res integra*, I should myself hold that in no case could title pass where the possession has been obtained by fraud or deceit, and in my opinion there is no solid ground of distinction between cases where the title has been obtained by fraud and those in which only a naked possession has been so obtained. To say that a vendor has parted with his title under such circumstances may be correct in terms, but how has he parted with it? Why, under the in

fluence of fraud and false pretences. His judgment and will have been cheated. All the requirements necessary to constitute a legal contract for the alienation of property have been outraged, yet that which the law in its civil issues treats as void, by the sublimated metaphysics of the criminal law is made valid. This is a refinement in the direction of protecting guilt and defrauding innocence ; it is a distinction in violation of common sense, and of all the analogies of the law, and if I were not bound by precedents I should not hesitate to declare all such transactions larcenies.

The court has, without any hesitation and without argument on the part of the United States, concluded to affirm the decision below, and it is so ordered.

HORACE S. JOHNSTON

vs.

THE DISTRICT OF COLUMBIA.

AT LAW. No. 18,655.

{ Decided March 27, 1889.

{ THE CHIEF JUSTICE and Justices COX and JAMES sitting.

1. Evidence to be admissible must be applicable to the averments of the declaration.
2. It is no ground of action against a municipal corporation that it has committed a mere error of judgment in the construction of a street sewer whereby damage ensues to adjoining property, when it is not alleged that the defect of construction was caused by the carelessness of the defendant, or was brought to its notice.
3. The amendment of a declaration, so as to state for the first time a cause of action, is equivalent to bringing a new suit as of the date of the amendment ; and if the statutory period of limitations has elapsed, the action will be barred, notwithstanding the original declaration was filed within the statutory period.

THE CASE is sufficiently stated in the opinion.

W. A. COOK and JOHN E. NORRIS for plaintiff :

The District was liable for defects either in the workmanship or capacity of the sewer complained of. Indianapolis

vs. Hoffer, 30 Ind., 233 ; *Mayor, etc., vs. Thompson*, 29 Ark., 569 ; *Dixon vs. Barker*, 65 Ill., 518.

FRANCIS MILLER for defendant :

Liability for damages caused by a defective plan can only arise when the corporation has been negligent in the selection of the officers to whom it has entrusted the work of devising that plan. See cases cited in notes to sections 753, 799 and 801 of Dillon on Municipal Corporations ; and *Mills vs. Brooklyn*, 32 N. Y., 489 ; *Child vs. Boston*, 4 Allen, 41 ; *Wilson vs. New York*, 1 Denio, 599 ; *Carr vs. Northern Liberties*, 35 Penn. St., 324, approved by Sharswood, J., in *Grant vs. Erie*, 69 Penn., 422 ; *Beekman vs. Detroit*, 34 Mich, 125 ; *Van Pelt vs. Davenport*, 42 Iowa, 308.

Mr. Justice Cox delivered the opinion of the court.

This is an action for damages for injuries sustained by the plaintiff in consequence of the overflow of water from the Missouri avenue sewer into the basements of his houses situated on Four-and-a-half street and Missouri avenue, July, 1877. The only allegation in the original declaration looking to responsibility of the District, is that the sewer constructed by it on Missouri avenue is defective and imperfect, and upon every fall of rain fills and overflows. It is not alleged that the imperfection or defect was caused through the neglect of the defendant, or was brought to the notice of the District authorities ; nor is the nature of the defect or imperfection set forth. On its face the declaration does not seem to state a cause of action. At the trial the plaintiff offered to prove that the plan on which the sewer had been constructed by the authorities of the District had not been judiciously selected. This testimony was excluded, and is the ground of the first exception.

In the first place there seems to be no averment in the declaration to which such evidence was applicable. In the next place, a mere error of judgment in the construction of such work does not seem, on the authorities, to be a ground of action in the absence of carelessness in the selection of a plan, or the employment of proper agents to devise and ex-

ecute it ; and if such want of care existed it ought, unquestionably, to be averred in the declaration. On this ground we think the evidence was rightly excluded.

More than three years after the bringing of the suit, and after the occurrence of the alleged injury, the plaintiff filed an amendment to his declaration, in which he charged knowledge on the part of the District of the defect and inadequacy of the sewer, and also failure to inspect the same after due notice of its condition, and also knowingly and wrongfully suffering it to choke up and thus overflow. To this amended declaration the defendant pleaded the statute of limitations, and the plea was demurred to ; but the demurrer was overruled by the court below.

We think the original declaration did not state a cause of action, but that such cause of action was stated for the first time in the amendment, and that it is equivalent to bringing a new suit as of the date when the amendment was filed, and that the defendant cannot be deprived of the opportunity of pleading the defense of limitations by the circumstance that this amendment, stating a cause of action for the first time, was added to the declaration filed within the statutory period, and, therefore, the demurrer to the plea was properly overruled by the court below.

Judgment affirmed.

JOHN F. MAY

vs.

ALEXANDER R. SHEPHERD

AT LAW. No. 20,320.

1. A verbal agreement to receive a greater rate of interest than six per cent. for forbearance after a debt is due is void under the Revised Statutes of the District of Columbia, Sec. 715.
 2. A void promise to pay illegal interest is not a valuable consideration for a promise to forbear. It is a mere *nudum pactum*.
 3. While it is perfectly well settled that a valid agreement between a creditor and the principal debtor, giving time after the maturity of the note, discharges the surety, yet the agreement must be a binding one; otherwise it is a mere voluntary indulgence and no valid defense for the surety.
 4. By the provisions of a deed of trust given to secure a promissory note, the terms of sale in case of default were as follows: "*The amount of indebtedness* secured by said deed of trust unpaid, with the expense of the sale, in cash, and the balance at twelve and eighteen months."
- Held*, Not to be construed as depriving the trustees of the power to sell for less than the full amount of the debt, taxes and expenses. A provision in a deed of trust to secure a debt, to have that effect should be very clearly expressed. The true construction of this language is, that the trustees should require a cash payment of enough to satisfy the debt, if the purchase money be sufficient for that purpose, and the balance, if any, in two instalments.
5. S. gave his promissory note, bearing ten per cent. interest until paid, to M., and secured the same by deed of trust upon real estate; subsequently S., for a valuable consideration, conveyed the equity of redemption to W., and paid the interest on the note up to the date of the conveyance. W. then paid the interest until the maturity of the note, when he went to M. and told him that he (W.) had to pay the note, but asked for an extension of one year at the same rate of interest, which was granted. The agreement to extend was not in writing. A subsequent extension was obtained in the same manner. Default having finally been made, the property was sold, but did not sell for enough to satisfy the note. Whereupon S. was sued for the balance, and was held by the court liable for the same.

STATEMENT OF THE CASE.

Motion for new trial on exceptions.

The declaration consisted, besides the money counts, of a special count on a promissory note dated April 26, 1875, by which defendant promised to pay to the order of the plaintiff \$10,000, two years after date, with interest, payable quarterly, at ten per cent. until paid. The interest had been paid up to April 26, 1878, and \$8,132.10 of the principal had been paid and credited February 19, 1879. The plaintiff

claimed a balance due of \$2,684.56, with interest at ten per cent. until paid from February 19, 1879. The note was secured by deed of trust upon real estate, and the trust having been foreclosed by a sale of the property at public auction, the plaintiff became the purchaser, the net proceeds of the sale, \$8,132.10, being credited, as above stated, on the note, February 19, 1879. This suit was brought against defendant to recover the balance due.

The defendant, besides the general issue, filed three special pleas, in substance as follows :

1. Estoppel *in pais*, because the plaintiff required and received from defendant as security for said note, a deed of trust of real estate, and agreed to its terms and provisions, by which power is given to the trustees to sell upon default made in payment, and that upon such sale the purchase money shall amount in cash to the amount of the indebtedness secured, with the expenses of sale, that plaintiff required sale to be made under the powers, terms, and conditions of said deed of trust, and at a sale so made, became the purchaser of said real estate, and received a deed therefor, and entered into possession thereof.

2. That said note was secured to be paid by a deed of trust of valuable real estate, with power to the trustee to sell upon default, and plaintiff caused said property to be advertised and sold, and purchased at said sale, and said property exceeded in value the amount of said note, with interest, costs of sale and taxes; wherefore he says that said note is paid and satisfied.

3. Estoppel by deed, because said note was secured to be paid by deed of trust of even date to Richard Wallach and Andrew B. Duvall, as trustees, (profert) whereby, valuable real estate described, was conveyed with power in said trustees to sell upon default made in the payment of said note, upon the terms prescribed by the deed of trust, to wit : The amount of indebtedness secured by said deed of trust unpaid and the expense of sale, in cash, and the balance at twelve and eighteen months, &c.: and thereafter said trustees, by

their deed bearing date February 19, 1879, (profert) conveyed said real estate to plaintiff, and in said deed it is recited that this defendant and his wife made and executed the said deed of trust, and that the trustees in execution of the trusts therein declared, and by direction of the party secured thereby (meaning the plaintiff) made sale of said real estate, at which sale the plaintiff became the purchaser, and that the plaintiff had fully complied with the terms of said sale.

Upon all of these pleas issue was joined. At the trial, the note having been first offered and admitted in evidence, plaintiff testified that the same was given to him by the defendant for money lent by plaintiff to defendant. The deed of trust by which the note was secured was then offered and admitted in evidence. It was in substance as follows :

Date, April 26, 1875. Alexander R. Shepherd and wife to Richard Wallach and Andrew B. Duvall, trustees. Recites that Shepherd is indebted to John F. May, \$10,000, and has given his promissory note of even date at two years, interest at ten per cent. payable quarterly, until paid, and to secure its payment, conveys lot 17 of Babcock's subdivision of part of square 103, Washington, D. C., upon certain trusts, among which that, upon default made, to sell at public auction, upon 20 days advertisement of terms, &c., "which said terms of sale shall be as follows, viz., the amount of indebtedness secured by said deed of trust, unpaid, with the expense of sale, in cash, and the balance at twelve and eighteen months for which the notes of the purchaser, bearing interest from the day of sale, and secured by deed of trust on the property sold, shall be taken."

The plaintiff further testified, that before the maturity of the note the defendant sold to Gilbert C. Walker and paid the interest that accrued upon the note up to the time of the sale, and thereafter said Walker paid the interest upon said note to him up to its maturity ; that upon the maturity of the note, Walker came to him—told him that he (Walker) had to pay the note, and asked that the note be

extended for him for one year, and thereupon he extended the note for one year at the same rate of interest; that Walker paid the interest upon the note for the time of the extension, and at its maturity again requested a further extension for one year, but he refused to extend it for a year, but did extend it for nine months, at the same rate of interest; that no interest was paid for the last extension, and after the expiration of nine months, default being made in the payment of the note and interest, he caused the trustees under the deed of trust to sell the said real estate at public auction as required by the deed of trust, and at a sale so made he purchased the property for the sum of \$8,500, and after deducting the expenses of sale and taxes the balance of \$8,132.10 was credited upon the note, and the balance, \$2,684.56, with interest from the day of sale, was due and unpaid; that the property was duly conveyed to him by Wallach and Duvall, trustees, and he was in possession.

This was all of the evidence given in behalf of the plaintiff, who then rested.

Thereupon the defendant prayed the court to instruct the jury to return a verdict for the defendant, which the court refused. Whereupon defendant, after excepting to the refusal of the court so to instruct the jury, offered in evidence the deed from Duvall and Wallach, trustees to the plaintiff, in substance as follows:

Deed dated February 19, 1879. Wallach and Duvall, trustees, to John F. May. Recites that Shepherd and wife had made and executed a deed of trust, dated April 26, 1875, conveying the property described, to secure the payment of a certain promissory note, and upon default in payment to sell at auction; and of the proceeds to pay said note, interest and costs of sale, and to convey the said real estate to the purchaser thereof, all of which will fully appear upon reference to said deed of trust; that default having been made, the trustees, in execution of the trusts declared in said deed of trust, proceeded to make sale, and sold to John F. May, who being the highest and best bidder therefor, at and for the sum or consideration hereinafter mentioned

(\$8,500), became the purchaser thereof, and whereas the said John F. May hath fully complied with the terms of said sale, &c., conveys him lot 17, Babcock's subdivision of part of square 103, Washington, D. C.

The defendant then prayed the court to instruct the jury that the plaintiff was estopped by his acts in the premises from saying or claiming that the said promissory note was not paid, which prayer the court refused to grant.

The defendant thereupon prayed the court to instruct the jury that the plaintiff was estopped by the said conveyances from saying or claiming that the note was not paid; which the court also refused to grant. Defendant then offered to prove that the property sold under the deed of trust and purchased by the plaintiff was, at the time of sale, and now is, at a fair and reasonable estimate, worth \$15,000; but the court ruled the proof inadmissible. An offer was then made to prove by the auctioneer who made the sale, that the plaintiff was the only bidder at the sale; this also the court overruled.

The defendant then further offered in evidence, and the same was admitted, the deed of defendant to Gilbert C. Walker, in substance as follows:

Deed dated August 1, 1876. Alexander R. Shepherd and wife to Gilbert C. Walker. In consideration of \$30,000, conveys lot 17, in Babcock's subdivision of part of square 103, subject, however to a certain deed of trust dated April 26, 1875, and recorded in liber 781, folio 481, said deed of trust being for \$10,000, covenant against all claims under him "except the aforesaid deed of trust."

No other evidence being offered, the court instructed the jury that the evidence in behalf of the defendant, though believed by the jury, was not legally competent to defeat the plaintiff's right to recover, to which instruction, and to the refusal of the court to admit the evidence as above offered, the defendant excepted.

Verdict for plaintiff for \$3,163.28 and costs.

ANDREW B. DUVALL for plaintiff :

Before the maturity of the note the defendant sold and conveyed said real estate, "subject to said deed of trust," to G. C. Walker, who did not assume the payment of the note in the deed or covenants, nor was its amount deducted from the purchase money so far as the record shows.

Whatever may have been the relations established between Shepherd and Walker by this sale and purchase of the equity of redemption in said real estate, we maintain defendant's relation to plaintiff upon the note remained unchanged ; there was no novation ; defendant was and continued to be the maker of the note ; his liability as such was ever fixed and determined ; he did not become Walker's surety on the note, for Walker was never a party thereto. In equity, as between defendant and Walker, if the latter had assumed in the deed or covenanted to pay the mortgage, especially if the amount was deducted from the price, it may be that defendant became his surety, but not as between plaintiff and defendant. 1 Hill on Mortg., 327, and cases. *Waters vs. Hubbard*, 44 Conn., 340, 348.

Even if Walker, in the deed to him, had assumed payment of the deed of trust, the holder of the note might treat both him and the defendant as principals. *Corbett vs. Waterman*, 11 Iowa, 86.

Defendant could have discharged his obligation at any time after maturity of the note by payment ; the so-called extension of the note was *nudum pactum*. Defendant could not have been damnified. There is no pretense that Walker was insolvent ; and if he had assumed payment of the note, and was, as between them, primarily liable, defendant could have enforced that contract without actual payment by himself. *Rawson vs. Copeland*, 2 Sandf., 284.

A contract to pay usurious interest constitutes no consideration. 74 Pa. St. 36 ; 10 Ind., 227 : 45 N. H. 104, 81 Md., 126.

It was not competent in this case for defendant to litigate any question as to the manner or sufficiency of the

sale made under the deed of trust by the trustees; any such alleged breaches of trust were only cognizable upon a direct issue with them in a court of chancery. The court below, therefore, properly refused to entertain testimony relative to the value of the security, the adequacy of the price obtained, or the number of bidders at the sale made by the trustees. *Hill. on Trustees*, 518-521; *Shields vs. Barrow*, 17 How., 130-139.

The note and the deed of trust are for many purposes distinct. Different remedies are administered in different tribunals for each; different parties are convened. The note may be barred, and yet the trust enforced; the trust may be void, and yet the note valid; the note may be in judgment, and that barred by limitations, and still it would not extinguish the collateral remedy under the deed of trust, though it had relation to and was intended to secure payment of the same note. *Bank of Metropolis vs. Guttschlick*, 14 Pet., 19-32.

The deed of trust executed by Shepherd was the customary collateral security for the repayment of money loaned. It was intended as such, and as such it is pleaded by defendant. There is no foundation for the claim now made by him, that he was to be absolutely absolved from any further accountability on the note in the event of a sale under the deed of trust. The terms of sale prescribed in the deed (upon which defendant claims the estoppel) are the mere incidents of the power lodged in the trustees; the power to sell for cash was inserted solely to prevent any delay in realizing the money upon default in payment of the money." *Markey vs. Langley*, 93 U. S., 142.

The operation of deeds is a question of intention; the doctrine of estoppel is never carried further than the parties appear from the tenor of the whole instrument to have agreed. The presumption is against rather than in favor of estoppel, and the party relying upon it must show that it results from the particular clause, and is consistent with the tenor and object of the deed.

There was no error, and the judgment should be affirmed

WM. F. MATTINGLY and A. C. BRADLEY for defendant :

The several exceptions raise two principal points :

1st. Whether the defendant was not discharged from any liability on the note sued by reason of the facts, that after he sold to Walker the property described in the deed of trust, constituting the security for the payment of the note, subject to that lien, and with the agreement on the part of Walker to assume and pay the note, the plaintiff with full knowledge of the sale and of Walker's assumed relations to the note, collected interest upon it from Walker up to the time of its maturity, and then, at his request, and without the knowledge and consent of defendant, extended the note for one year, at the same rate of interest, and subsequently extended it for a further period of nine months.

2d. Whether the plaintiff, by agreeing to the terms of the deed of trust, that upon a sale made, the cash payment should be the amount of the debt and expense of sale, by causing the property to be advertised and sold upon those terms, by purchasing at such sale, taking a deed of the property, and reciting that he had fully complied with the terms of sale, by entering into possession of the property, and claiming to hold and own the same under the said sale and deed, is not estopped to say that the note is not paid.

The note and deed of trust constitute one transaction and must be considered as one instrument. 1 Pars. on Con. (5th ed.), 653 ; Hunt vs. Frost, 4 Cush. 54 ; 60 Mo., 79 ; 31 Me., 243.

The *parole* extension of the time of payment by May for Walker was sufficient. Jones, Mtg., 1189-90-91 ; 21 N. J., Eq., 338 ; 3 Green. Ch., 141 ; 2 Wend., 587.

The note bore 10 per cent. interest till paid, and its extension for the same rate of interest, was for a sufficient consideration, and binding. 57 Mo., 101 ; 69 Mo., 539 ; 14 Ohio, 348 ; 15 Ib., 298 ; 31 Ib., 637.

Walker purchased from the defendant "subject to" the deed of trust ; the defendant excepted the deed of trust

from his covenant of warranty, and Walker informed the plaintiff that he had assumed the payment of the note, and paid to the plaintiff all the interest upon the note that accrued after the purchase to the end of the extension. Formal words need not be used to show that the purchaser of mortgaged premises assumed the payment of the mortgage. The assumption may be established by circumstances and a parole or verbal promise is sufficient. Jones on Mortg., 760, 761, 762; 88 Penn., 450; 22 Ib., 680; 13 Allen, 168; 7 Cush., 337.

In this case, under his assumed relations to the debt, Walker became liable upon it to suit at law by May. Jones on Mortg., 758; 7 Cush., 337; 2 Denio, 45; 24 N. Y., 178; 38 Iowa, 396; 3 Ohio, 549; 4 Ib., 333-4.

Walker having assumed the payment of the note, the defendant occupied the relation of surety to it as between them; and the plaintiff being fully informed as to that relation, was bound to conduct himself in accordance with the rights of the surety, and by extending the time of payment of the note without the knowledge and consent of the defendant, the defendant was discharged from liability on it. Jones on Mortg., 740, 741, 742; 56 N. Y., 406; 67 N. Y., 96; 10 Bligh, N. P. R., 548, 80, 81; 36 Mich. 373; 73 N. Y., 211.

The plaintiff holds under a deed which recites that the property was sold in accordance with the terms prescribed by the deed of trust, and that he became the purchaser of such and has fully complied with the terms of sale. The deed of trust prescribed that the terms of sale shall be the amount of the note and expenses of sale in cash, and the plaintiff is estopped to say that the note is not paid. 17 Johns., 161, 166; 44 N. Y., 50; 12 How., 256; 52 Dees, 454.

A party cannot occupy inconsistent positions, and where one has an election between inconsistent courses of action he will be confined to that which he first adopts. Any decisive act of the party done with knowledge, determines his election and works an estoppel. The plaintiff cannot hold the property and say that the note is not paid. Bigelow on Estop., 503, 504, &c.; 18 B. Mon., 175; 12 Met., 405; 26 N. Y., 495.

The 4th and 5th exceptions show that the property was worth more than sufficient to pay the debt, and that the plaintiff bought in at such bid as he saw fit to make, and in view of the terms of the deed of trust the evidence was admissible to show payment of the debt by the sale.

Mr. Justice Cox delivered the opinion of the court :

On April 16, 1875, Mr. Shepherd borrowed \$10,000 from Dr. May, giving his own note for the full amount, three years after date, and, at the same time, executed a deed of trust to certain trustees, reciting this indebtedness, and authorizing among other things, "upon default made, to sell at public auction, upon twenty days' advertisement of terms, &c., which said terms of sale shall be as follows, viz., the amount of indebtedness secured by said deed of trust, unpaid, with the expense of sale, in cash, and the balance at twelve and eighteen months, for which the notes of the purchaser, bearing interest from the day of sale and secured by deed of trust on the property sold, shall be taken."

A little more than a year after the execution of the deed, on August 1, 1876, Shepherd and wife conveyed the equity of redemption to Albert C. Walker, the consideration named being \$30,000, and the conveyance being "subject to a certain deed of trust, dated," &c., and containing a covenant against all other claims. When this transaction took place, Shepherd paid the interest on his note up to the time of his conveyance to Walker, and Walker paid the interest until the maturity of the note, and then came to May and told him he had to pay the note, but asked for an extension for one year. This was granted, at the same rate of interest. Walker paid the interest for the time of the extension, and, at maturity, requested a further extension for a year, and got it for nine months at the same rate. There was no payment after the last extension, and at the end of the nine months, May got the trustees to sell, as required by the deed, at public auction, and bought the property for \$8,500. After deducting the expenses of the sale, the balance was credited on the note, and the balance of \$2,684.56, due on the note,

with interest from the day of sale, was sued for. Upon this state of facts, the defendant prayed the court to instruct the jury to return a verdict for him, but the court refused, very properly, because that would have been to take the case entirely from the jury, after all the facts were before them affecting the plaintiff's right to recover and to defeat that right. There was no question about the note having been given, or as to the handwriting, but the instruction asked was substantially that the facts proven were not sufficient. But the defendant also contends that there were facts enough, taken together, before the jury tending to show that, although the deed from Shepherd to Walker had no provision that Walker would assume the payment of the note secured on the property, yet, in point of fact, such was the understanding, and this was supposed to be made out by circumstances. Shepherd paid the interest quarterly up to the time he sold to Walker, and Walker told May he would have to pay the note, and procured an indulgence. It is contended that this gave May a right of action against Walker upon his verbal promise to pay the note, as if Walker, for sufficient consideration, had personally become indebted to May, and perhaps the weight of authority is in that direction. It is further contended by the plaintiff that, if this was so, the effect was to make Walker the principal debtor from that time, and Shepherd a mere surety for the payment of the debt, although the arrangement was made by parol. And it is further contended that May would not afterwards be allowed to make any arrangement with Walker, his principal debtor, which would operate to the prejudice of Shepherd, thus become a mere surety. It is yet further contended that the extension of time granted to Walker was a benefit both to debtor and creditor, and though for the same rate of interest was for a sufficient consideration, but on this point there is a conflict of opinion. But, conceding all the other points contended for by the defense, was this agreement a valid one between Walker and May for forbearance? The agreement was verbal that Walker should pay interest at the rate of ten per cent. on \$1,000 first for one year and

then for nine months in consideration of May's giving time during those respective periods. The Maryland statute is substantially that of Ann, by which an agreement to pay more than £6 for a forbearance of £100, or at that rate, for more than one year, was absolutely void. If that was the arrangement, neither principal or interest was recoverable. Under the Maryland statute, in case of an extension of a contract for legal interest for a longer time at a higher rate than legal interest, the new agreement is void, although the original contract is still valid; and this whether the new agreement be written or verbal. The law in the Revised Statutes is thus laid down for this District :

"SEC. 713. The rate of interest upon judgments or decrees, and upon the loan or forbearance of any money, goods or things in action shall continue to be six dollars upon one hundred dollars for one year, and after that rate for a greater or less sum or for a longer or shorter time, except as provided in this chapter.

"SEC. 714. In all contracts made, it shall be lawful for the parties to stipulate or agree in writing that the rate of ten per centum per annum or any less sum of interest shall be taken and paid upon every one hundred dollars of money loaned or in any manner due and owing from any person or corporation in the District.

"SEC. 715. If any person or corporation shall contract to receive a greater rate of interest than ten per cent. upon any contract in writing or six per cent. upon any verbal contract, such person or corporation shall forfeit the whole of the interest so contracted to be received, and shall be entitled only to recover the principal sum due to such person or corporation."

It seems plain that the verbal agreement to receive a greater rate of interest than six per cent. for forbearance after this note was due, was simply void under the statute. Cases were cited from Ohio and Missouri bearing on this question. In Missouri it is settled that an actual payment of usurious interest in advance for forbearance will sustain the promise, but they distinguish plainly between actual

payment and an executory agreement to pay, the latter being no consideration for the promise to forbear. The cases in Ohio seem to hold the promise to pay usurious interest a good consideration for forbearance on the ground that under a State statute such a promise is valid for the legal interest and void only for the excess. All the cases recognize the doctrine that a void promise to pay illegal interest is not a valuable consideration for a promise to forbear. It is a mere *nudum pactum*. The law is perfectly well settled that a valid agreement between a creditor and the principal debtor giving time after the maturity of a note discharges the surety. But that agreement must be a binding one; otherwise, it is merely a voluntary indulgence, and no valid defense for the surety. Hence, as has been said, assuming the positions of the defense to be correct, this extension granted by May to Walker is no valid defense for Shepherd. It is true that the note bore 10 per cent. interest until paid. But after the maturity the creditor could exact and the debtor could pay at any moment. *Here was a new agreement* having the same effect as if the money had been paid and then reloaned for a definite time. The defendant further relied on the terms of the deed, claiming that under the provisions for the sale of the property, the trustees had no power to sell for less than the full amount of the debt and taxes and expenses; and that, inasmuch as the sale had realized for less, and May had gone into possession, he was estopped from averring non-payment of the debt, or any balance of it, and was chargeable with the entire amount of it. But this seems not a fair construction of the deed. It is very improbable that any creditor would enter into a contract to lend money with the understanding that, if the security depreciated, he would lose all of his debt, or have to accept the security in full satisfaction of it. Such an understanding, therefore, must be very plainly expressed in the deed. The provision relied upon does not apply to the power to sell, but to the distribution of the proceeds, between cash and credit payments, to the extent of the debt. It assumes that the property will sell for more than the debt, and it is plain that that was the opinion of

both parties at the time. If the construction contended for were correct, then in case of the depreciation of the property, the creditor would have to take it in full satisfaction of the trust, or surrender his debt altogether. The true construction of the provision in question is that the trustees should require a cash payment of enough to satisfy the debt, if the purchase money were sufficient for that purpose, and the balance in two instalments. Undoubtedly the trustees so regarded it, and May's contract was according to that understanding. If they were wrong, the sale might be set aside. But no different contract could be made for May by the court as would be done by charging him with the full amount of his debt as if he had bought on those terms. It would only follow that the sale might be set aside. It is said that May is in possession, but he only took possession on certain agreed terms and, if there was no right, there is no lawful possession. We could not require him to hold on different terms; he must be put to his election to surrender or take the property at the full amount of his debt, with the taxes, &c. Therefore, the facts which were proven in defense did not furnish a defense to the action, and a *prima facie* case being made out by the plaintiff, the judgment below must be affirmed.

{ Decided April 3, 1882.

{ THE CHIEF JUSTICE and Justices COX and JAMES sitting.

LEONARD MACKALL, TRUSTEE FOR BROOKE MACKALL,

vs.

ALFRED RICHARDS.

AT LAW. No. 19,635.

{ Decided April 8, 1882.

{ The CHIEF JUSTICE and Justices WYLLIE and JAMES sitting.

1. The common law rule requiring the use of the word "heirs" in deeds of conveyance, in order to pass a fee, does not apply to deeds of trust; the latter are to be construed according to the intention, the trustee taking only such estate as is necessary for the execution of the trust.
 2. Where the trust is created solely for the benefit of the *cestui que trust*, he having the absolute control of the property, the power of disposition and the right of possession, the trustee cannot maintain the ejectment against him.
 3. Where the trustee has no right of possession, save in behalf of the *cestui que trust*, and the latter conveys his entire interest to another pending an ejectment suit, brought in the name of the trustee in behalf of the *cestui que trust*, and includes in the conveyance his interest in the mesne profits claimed of the defendant in the pending suit, the trustee has no longer a right of action.
 4. The habendum clause of a trust deed was as follows: "To have and to hold the said lots, &c., unto the said party of the second part (the trustees) his heirs and assigns forever, for his and their sole use, benefit and behoof forever, in trust, nevertheless, for the use and purpose following, and none others, that is to say: to hold the same for the use and benefit of the aforesaid (*cestui que trust*) and subject to his absolute control and disposal, and to sell and dispose of the same as the said (*cestui que trust*) may in writing direct and require.
- Held* that the *cestui que trust* had the entire control and power of disposition over the property, including the right of possession, and having conveyed his entire interest pending an ejectment suit brought in his behalf in the name of the trustee, the defendant in the suit could set up the conveyance as a good defense against plaintiff, the trustee.

STATEMENT OF THE CASE.

MOTION for new trial on exceptions.

This was an action of ejectment. The plaintiff claimed the fee-simple of the property in question, and alleged that he was lawfully possessed in November, 1870, when the defendant entered and dispossessed him. There was also a count for mesne profits. Plea, not guilty, to which issue was joined. It was stipulated in the case that in 1851 the legal title to the lot in dispute was in W. W. Corcoran and W. S. Nichols, one undivided moiety then being in each. On

the ~~now~~ trial the plaintiff read in evidence a conveyance of the undivided moiety of Corcoran to Brooke Mackall, and then a conveyance of Brooke Mackall and Joseph B. Hill, trustee, (as to the Nicholls moiety) to the plaintiff. The habendum clause of the deed to plaintiff was as follows:

“To have and to hold the said lot, piece or parcel of land and premises, with the appurtenances, unto the said party of the second part, his heirs and assigns forever, for his and their sole use, benefit and behoof forever.”

“In trust, nevertheless, for the uses and purposes following, and none others, that is to say, to hold the same for the use and benefit of the aforesaid Brooke Mackall, senior, and subject to his absolute control and disposal, and to sell and dispose of the same as the said Brooke Mackall, senior, may in writing direct and require.”

Evidence was then given of the defendant taking possession of the property, of his occupation of it for a long time, and of his receipt of the rents, and the plaintiff then rested. It was admitted that Brooke Mackall, senior, had died since the commencement of the action.

The defendant then read in evidence a deed executed by Brooke Mackall, senior, a short time before his death, and while this suit was pending, to his son, Brooke Mackall, junior, “of all my right, title, and interest in and to all of that certain lot of land and premises (describing the property in dispute, including my interest in a claim for mesne profits against Alfred Richards, for which a suit is now pending; * * * together with all the buildings, improvements, rights, privileges, appurtenances and betterments to the same belonging, or in any manner appertaining, and all the remainders, reversions, rents, issues, and profits thereof, now due, or to become due; and all the estate, right, title, interest, and claims whatsoever, either in law or in equity, of the said party of the first part, of, in, to, or out of the said land and premises as hereinbefore mentioned and described. To have and hold the said lot of land and premises, with the appurtenances, unto the said party of the second part, his heirs and assigns forever, for him and their sole use, benefit and behoof forever.

“The said party of the first part also hereby requests and directs Leonard Mackall, trustee, to convey the legal title to the aforesaid lot and premises to the said Brooke Mackall, junior, of the second part, on his demand.”

Thereupon, the evidence being closed, the defendant asked the court to instruct the jury to render a verdict for the defendant, which being granted, a verdict was so rendered.

W. WILLOUGHBY for plaintiff:

It was contended by counsel for defendant in the court below that the conveyance from Brooke Mackall to the plaintiff did not execute the legal title in the plaintiff, but that by the statute of uses it vested in the *cestui que trust*.

It will be observed that by the habendum clause, the deed to the plaintiff conveys the property to him, “his heirs and assigns forever, *for his and their sole use* and benefit, and behoof forever.” The *first use* is therefore in the trustee, and the legal title is in him, without regard to the nature of the trust.

“Where the conveyance or devise is to, and *to the use of*, the trustees, they will take the legal estate, without the aid of any reasoning derived from the nature of the trust.” Hill on Trustee, 235, where the subject is fully discussed; see also Hopkins vs. Hopkins, 1 Atkins, 591; Cooley’s Blackstone, Book 2, p. 336.

“The claimant must be clothed with a legal title to the lands, and a trustee, having the legal estate, is entitled to bring ejectment even against his *cestui que trust*. Whenever, therefore, in a conveyance to uses, the statute of uses does not execute the use in the *cestui que trust*, the *foefee*, etc., to uses has the legal estate, and may bring ejectment; thus, where an estate is limited upon an use, the latter use is not executed, but the legal estate is vested in him to whom *the first use* is limited.” Roscoe on Real Actions, 490.

“A use limited upon a use is not limited or effected by the statute of uses. The statute executes only the first use. In the case of a deed of bargain and sale, the whole force of the statute is exhausted in transferring the legal title in fee

simple to the bargainee. But the second use may be valid as a trust, and enforced in equity according to the rights of the parties. *Croxall vs. Shererd*, 5 Wall., 282.

"In all cases in which the trusts are not executed by the statute of uses, the legal estate vests in the trustees, and of course, in such cases, they may maintain ejectment." *Adams' Eject.*, 82.

Cestui que trust is tenant at will to the trustee, and the possession of the *cestui que trust* is the very possession in consideration of law of the trustees. *Adams' Eject.*, 51, note, and see page 32 and cases cited.

In ejectment the court can neither see nor know anything about trusts or equities. It is well settled that both parties must produce a strictly legal title. 24 How., 275, 389.

It is, however, an apparent relaxation of this rule, that the defendant shall not set up to defeat the action, an outstanding naked title in a trustee, where the trust is entirely satisfied, but this would not *prevent* the trustee from also maintaining the action in such case. *Hopkins vs. Stephens*, 2 Randolph, 422, cited in *Adams' Eject.*, 32, 11 Ohio, 334.

The decision of the court below was based upon the effect of the conveyances of the *cestui que trust* to another party, nearly two years after suit brought, and long after issue joined. To this we say, a denial of the allegations of the declaration puts in issue the title of the plaintiff, *at the date alleged*, or at least his title *at the commencement of the action*. Any title acquired subsequent to the issue thus joined, must be set up by a supplemental answer, in the nature of a plea *puis darrien continuance*. *Hardy vs. Johnson*, 1 Wall., 374, and see 4 Sergt. & Rawle, 134.

If this be so in a case where the defendant sets up a title in himself, on account of an event occurring subsequent to the joinder of issue, how much more should it be so where he merely sets up an outstanding title in another, with which he does not at all connect himself.

The defendant's theory is that the *cestui que trust* has destroyed the right of action. But "it is a maxim that no conveyance by *cestui que trust* can work a forfeiture of the

legal estate of the trustee, and it has been held that a fine or other alienation by *cestui que trust* for life does not work a forfeiture of his life estate." Saunders on Uses, Adams' Eject., 51, note. "The effect of an assignment by the *cestui que trust* is, not to change the estate of the trustee, but only to pass to the assignee precisely the *cestui's* own interest in the land." Hill. on Real Prop., 328, citing 2 Ch. Cases, 78, 2 Blackf.

And this is all that the *cestui que trust* intended or undertook to do in this case. He granted simply all his right, title and interest in the land, including his "interest in a claim for mesne profits against Alfred Richards, *for which a suit is now pending*," and requests and directs Leonard Mackall, the trustee, to convey the legal title to the said Brooke Mackall, junior, *on his demand*. Brooke Mackall, Jr., certainly has not the legal title; his father could not and did not profess to give it to him. He certainly now, before making any demand, and obtaining a conveyance in compliance with it, could not maintain an action of ejectment.

"The defendant may prevent a recovery by showing a title in himself or a clear subsisting title in a stranger, and a clear subsisting title outstanding in another, means such a title as the stranger could recover on in ejectment against either of the contending parties." 2 H. & J., 152.

Could Brooke Mackall, Jr., recover *in ejectment* against the trustee, Leonard Mackall?

As to the mesne profits :

"When a term of this kind is created, it does not cease when the trusts are satisfied, unless there is a proviso to that effect in the deed creating the term, and, therefore, when the deed contains no such proviso, the legal estate, however ancient the term may be, and notwithstanding it may have been assigned to attend the inheritance, will remain outstanding in the trustees or their representatives until it be surrendered to the party beneficially interested, or merge in a larger estate." Adams' Eject., 87; Sug. Vend., 3d ed., 268, 293.

Even if there had been a conveyance by the trustee himself, it would not abate the suit.

“Conveyance by lessor after date or demise whether to a stranger or to the defendant in ejectment does not affect the action nor abate the suit.” 2 J. J. Marsh., 281, citing Runnington, 414; 1 H. and M., 531; 2 Bibb., 535; see 21 G., 576; 7 Wend., 377; 3 Wheat., 212; Adams’ Eject., 320, note; Tyler Eject., 577.

Even the death of the plaintiff would not abate it. 1 H. and M., 531; 1 Bacon’s Abr., 13; 1 H. & J., 280; Tyler Eject., 577; 8 John, 507; 3 Mumf., 191; 2 Mumf., 453.

Even though the term for which the suit was brought *absolutely expires* during the suit, it does not abate the action “If a term expires pending an action, the party shall not have possession, but he may have his damages.” 2 Bacon, 431, title Eject., *f*, Verdict on Judgment.

“The reason why, after there is *an end of the title* of the plaintiff pending the ejectment, he may recover damages and costs, is because the defendant unjustly withheld the possession at the time the action was brought.” 4 Sergt. & Rawle, 134; and to the same effect are 1 Nott & McCord, So. Ca., 209; 1 Peters, C. C., 292; Roscoe on Real Actions, 490; 18 John, 295; 1 Bacon Abr., 22; 2 Strange, 1056.

This is the rule even when only the action for possession of the land is pending. It is necessary to have a judgment for the land in order that the action for damages and mesne profits may be sustained. Now, in the case at bar, as permitted by rule of this court, there was actually pending the action for mesne profits, and they had been proved. But the whole action was dismissed, or rather a verdict was directed, barring a recovery for them. The action for mesne profits was a *chose in action*, unassignable at law, even by the legal owner thereof, much less by the equitable owner. Surely the assignment of this equitable claim by the *cestui que trust*, describing it as his interest in a pending suit, could not destroy the legal title thereto of the trustee, so that he could not, if necessary, maintain the suit for the use of the equitable assignee.

W. B. WEBB and ENOCH TOTTEK for defendant :

The plaintiff has no independent title himself, his relationship to the case is purely fiduciary, and his right to recover depends entirely upon the interest that is vested in him by the terms of the trust. These terms then become a matter of the first importance, for upon them depend the power and right of the plaintiff in this case. As some stress is put upon the language of the habendum clause, we quote the whole of that portion of the deed under which the trust arises. It is in these words : " To have and to hold the said lot, piece or parcel of land and premises, with appurtenances, unto the said party of the second part, (the plaintiff), his heirs and assigns forever, for his and their sole use, benefit and behoof forever, in trust, nevertheless, for the use and purposes following, and none others, that is to say, *to hold the same for the use and benefit of the aforesaid Brooke Mackall, senior, and subject to his absolute control and disposal, and to sell and dispose of the same, as the said Brooke Mackall, senior, may, in writing, direct and require.*"

The title of a trustee is commensurate with the trust he is to execute—no greater and no less—and this whether his creation be by deed or will.

"In the case of a devise to trustees for particular purposes, the court will consider the legal estate as vested in the trustees as long as the execution of the trust requires it, and no longer ; and will, therefore, as soon as the trusts are satisfied, consider the legal estate as vested in the persons who are beneficially entitled to it." Greenl. Cruise, Title XII, sec. 29, and note.

Perry on Trusts lays down these two rules of construction, as having been adopted by the courts, in cases like that under consideration :

"1st. Wherever a trust is created, a legal estate sufficient for the purposes of the trust shall, if possible, be implied in the trustee, whatever may be implied in the trustee, whatever may be the limitation in the instrument—whether to himself or his heirs, or not ; and

“ 2d. Although a legal estate may be limited to a trustee to the fullest extent, as to him and his heirs, yet it shall not be covered further than the execution of the trust necessarily requires.” Perry on Trusts, sec. 312, and note ; Jarman on Wills, 156.

In the United States the distinction between deed and wills in respect to the trustees' estate has not been kept up, and the general rule is that whether words of inheritance in the trustee are or are not in the deed, the trustee will take an estate adequate to the execution of the trust, and no more nor less. Id., sec. 320, and note.

This same doctrine is laid down in Hill on Trustees, and numerous authorities are cited in support of it, and the cases where the estate of a trustee has terminated by law, or in which there is the presumption of a conveyance or surrender, are excepted from the general rule that the possessor of the legal title must sue in ejectment. Hill on Trustees, 274, and note ; and to the same effect are Doe vs. Nicholls, 1 Barn. & Cress., 336 ; Nicoll vs. Walworth, 4 Denio, 389.

But it is conclusive on this point that the Supreme Court of the United States has in more than one case sustained the doctrine announced by the text-writers to the fullest extent.

In Webster vs. Cooper, 14 How., 499, the court says : “ A devise to trustees and their heirs to the uses mentioned, carries the legal estate to the *cestui que use*, unless the will has imposed on the trustees some duty, the performance of which requires the legal estate to be vested in them. And in that case they would take an estate commensurate with the exigencies of their trust.” And the learned judge who delivered the opinion of the court cites a number of authorities in support of this doctrine. The same doctrine was again announced by the Supreme Court of the United States in Doe, lessee of Poor, vs. Considine, 6 Wall., 471.

Chancellor Kent says : “ The general rule is not to continue beyond the period required by the purposes of the trust ; and notwithstanding the devise to the trustees, *and their heirs*, they take only a chattel interest where the trust does not

require an estate of higher qualities. This doctrine rests upon a solid foundation of reason and authority, irrespective of the presence or absence of the statute of uses."

And again: and as its latest expression on that subject, in a case that went up from this court, the Supreme Court in express terms endorsed the doctrine laid down in *Poor vs. Considine*; and determined that a conveyance made by a trustee, &c., "was void, because his powers as such trustee had ceased." *Young vs. Bradley*, 101 U. S., 788.

It will be contended that under the interpretation put upon the statute of uses, a use cannot be limited upon a use, and that in such case the statute executes the first use only, and applying that interpretation to the case at bar, the use in *Leonard Mackall* is alone executed, so as to vest him with the legal title, thereby leaving the whole remaining estate a trust. While it may be questionable how far this interpretation of the statute governs the courts in this country, it is enough to say that the doctrine only applies to those cases where the trust created requires some estate in the trustee for its proper execution. All the cases cited will be found to be cases of this kind. Naked dry trusts, or trusts which, by their terms, or by operation of law, require no estate to support them, or trusts where a surrender or reconveyance will be presumed, or trusts which, by operation of law, have terminated, do not come within the rule prohibiting the limitation of a use upon a use. In such cases there is no estate in the trustee the trust is executed in the *cestui que trust*. In point of fact the *cestui que trust* in such cases becomes the real party in interest, and the only party in whose name the recovery of the property in question can be had. Rev. Stats. Dist. of Col., Sec. 809. And see note to *Greenl. Cruise, supra*:

No comment is needed upon the deed from Mackall, senior, to Mackall, junior. In effect it is an execution of the trust contained in the deed to the plaintiff. The terms used are explicit, and the aim is, to convey not only the lot in question, but along with it the claim of the grantor for mesne profits in this action. Whatever else may be thought

or siad of this deed, there can be no question that its intent was to put the title to the property in Brooke Mackall, junior, and if effective, it leaves the plaintiff in this action either totally divested of all title, or clothed with such a title as a court of law will not regard as sufficient to maintain an action of ejectment.

Mr. Justice JAMES delivered the opinion of the court :

The plaintiff, Leonard Mackall, who claims to hold as trustee for Brooke Mackall, senior, sues the defendant Richards in ejectment. The trustee asserts his title to the property in question under a deed to him containing the following clause :

“To have and to hold the said lot, piece or parcel of lands and premises, with the appurtenances, unto said party of the second part, his heirs and assigns forever, for his and their sole use, benefit and behoof forever.

“In trust, nevertheless, for the uses and purposes following and none others, that is to say, to hold the same for the use and benefit of the aforesaid Brooke Mackall, senior, and subject to his absolute control and disposal, and to sell and dispose of the same as the said Brooke Mackall, senior, may in writing direct and require.”

A good deal of the argument of the counsel for the plaintiff has been devoted to showing that the statute of uses did not execute the trust here and that a legal estate was taken by the trustee. It was hardly necessary to have spent any time upon that branch of the case for it is well settled since the statute of uses that where the conveyance is to the trustee for his own use, that is the first use and the legal estate is prevented by the statute from going to the *cestui que use*, the trustee himself taking it. The question here is what sort of a legal estate did the trustee take? It is very common learning that where an estate is “conveyed”—that is the strict technical term—by will to a trustee, the latter’s estate is ascertained by the intention. Does the same rule apply when the conveyance is by deed? We have looked into the authorities very carefully and without citing any

number of cases, we find, as was declared in a Massachusetts case by the learned real estate lawyer Wilde, and afterwards in a later case reiterated by him, and again in the most positive manner sustained by Chief-Justice Shaw, that while the general common law rule requires the use of the word "heirs" in order to pass an estate in fee simple, deeds in trust are always an exception to the rule, the latter being invariably construed according to the intention. The exception arose in the desire to reach the same end that was attained by means of conveyances to uses before the statute, when the courts of that day held that the common law rule in regard to words of inheritance being necessary did not apply to such conveyances. Hence, since the statute it has been declared that neither does the rule apply to trusts and that they are to be given the same construction. Accordingly, it is held in courts of equity, that if the intention is to give the trustee an estate in fee simple, he takes such an estate; on the other hand, the same court declares that if the intention be that he shall take a less estate, a fee would not pass notwithstanding the words of inheritance were in the instrument of conveyance. In section 312 of Perry on Trusts, it is said that: "In all cases where an estate is given to one for the use of another, in such manner that the statute of uses steps in and executes the estate in the *cestui que trust*, the statute executes in the *cestui que trust* only the estate which the first donee or trustee takes," that is, the statute executes or transfers the exact estate given to the trustee. Therefore, if A give an estate to B and his heirs, for the use of C and his heirs, the statute will execute the fee simple in C. But if A gives an estate to B for the use of C and his heirs, the statute will execute only an estate for the life of A in C; for that is the extent of the estate conveyed to B by a deed in that form, that is, by a deed that has no words of inheritance in B.' While this is the rule in respect to estates which the statute executes, a very different rule applies to estates upon a trust or use not executed by the statute. In these cases, the extent or quantity of the estate taken by the trustee is determined, not by the circumstance

that words of inheritance in the trustee are or are not used in the deed or will, but by the intent of the parties."

It is to be observed that, although it was decided in New York, as reported in 10 John. Rep., 495, that the word "heirs" was not necessary to create a fee in a trustee, yet a Pennsylvania case, in referring to that decision, seems to imply that such a view could only be taken in equity. But this can hardly be sound; for when courts of equity come to take hold of the question, it is often necessary for them to determine whether or not by law a legal estate has vested, and how large an estate has been passed.

In a Massachusetts case, for example there was a bill filed for specific performance, and the facts were that the person who had bought from the trustee, made a contract for the sale of the property, and agreed to give a good title, but the proposed vendee refused to take it, being of the opinion that the trustee had only a life estate; the question coming before the court whether it was a good title at law, it was held to be a good fee, on the ground that these were exceptions to the rule of common law conveyances, and that a conveyance to trustee without words of inheritance, could give him a fee simple, if such an estate was necessary in him for the execution of the trust. He was, in other words, to take as large an estate, and no larger, as was necessary for this purpose. This accords with the rules laid down in Washburne and Perry, and explains, as Washburne says, how an estate to A and his heirs, in trust for B until the latter shall attain the age of twenty-one years is a mere chattel interest, and if the trustee dies it could not be executed by his heir, but had to be executed by his executor during the remainder of the minority of the *cestui que trust*. If we apply this rule to the case at bar, we will see that the estate conveyed is for the benefit of Brooke Mackall, senior. This trustee could not, under the language of this deed, control the property, nor could he, as has been contended, bring an action of ejectment against his *cestui que trust*, for though the general rule was pressed upon us that a trustee could maintain ejectment against his *cestui que trust*, there are certain essentials neces-

sary to enable him to do so ; it is elementary law that he must have the legal title and the right of entry, but this trustee had no right of entry against his *cestui que trust*.

The *cestui que trust* had reserved to him, by the very declaration of the trust, an absolute control and power of disposition, and right of possession ; and it is plain that the trustee could not, therefore, maintain ejectment against him. Now, the grantor and *cestui que trust*, Brooke Mackall, senior, having brought action in the name of the trustee against a so-called stranger, disposed of his interest after the suit was brought, and the estate of the trustee ceased thereby.

The trustee had no right of possession save in behalf of the *cestui que trust*, and the latter had conveyed all his right to another, including his right of possession. In such a case the trustee could have no right to recover. It is said, however, that he has the right to go on and recover *mesne* profits ; but this can only be where the two rights go together. Here the loss of one involves the loss of the other ; they are both in the same boat, and both go down together. The right of action having determined, the suit must fail. Cases might be cited where a different rule applies, as where the defendant shows that he has acquired a better title since the action began, but we have found no such application to the entire loss of the plaintiff's title. The ground is not taken here that the defendant had acquired a new estate after the action began, but that the plaintiff's right of action disappeared with the right of possession in the *cestui que trust*.

The judgment below must be affirmed.

Mr. Justice WYLIE dissented.

ELEANORA HAYDEN, BY HER NEXT FRIEND, JOSEPH E. HAYDEN,

vs.

SOPHIA A. WESER ET AL.

IN EQUITY. No. 6823.

{ Decided April 6, 1882.
} The CHIEF JUSTICE and Justices COX and JAMES sitting.

1. A widow's dower before assignment cannot be sold by decree of a court of equity to satisfy an indebtedness due from the widow to the heir, growing out of her management of the heir's estate while acting as guardian thereof.
2. The costs of all permanent improvements made before assignment of dower are to be charged to the heir and not to the doweress.

STATEMENT OF THE CASE.

George Ailer died, in the year 1865, intestate, possessed of certain real estate in the city of Washington, and leaving his widow, now Mrs. Weser, and Eleanora Ailer, now Hayden, his only child and heir-at-law, surviving him. His widow assumed the administration of his estate and the guardianship of the child. The rents of the latter's estate amounted to about \$3,500 per annum.

In June, 1879, the daughter having married, this suit was brought for an account of Mrs. Weser's guardianship she having been, on the petition of her daughter, by her husband as next friend, removed from that trust March 1, 1879. The cause was thereupon referred to the auditor of the court with directions to state an account. The report found a balance of \$13,779.44 against the defendant, and the court below entered a decree for the sale of the defendant's dower interest in her late husband's real estate for the payment and satisfaction of this balance less the credit obtained by the allowance of several exceptions as to certain items of the account.

From this decree defendant appealed.

M. F. MORRIS for plaintiff.

HINE & THOMAS for defendant.

1. Dower, before assignment to the widow, is not the subject of sale for the satisfaction of creditors. Jackson vs.

Aspell, 20 John., 411. And this doctrine is maintained in Massachusetts, Kentucky, Illinois, Missouri, Alabama, and several other States of the Union. *Gooch vs. Atkins*, 14 Mass., 378 ; *Johnson vs. Morse*, 2 N. H., 48 ; *Shields vs. Bates*, 5 J. J. Marsh, 12 ; *Petty vs. Nailer*, 15 B. Mon., 591 ; *Nason vs. Allen*, 5 Greenl., 479 ; *Waller vs. Mardus*, 29 Mo., 25 ; *Wallis vs. Smith*, 2 S. & M., 220 ; *Torrey vs. Minor*, 1 Surr. & M. Ch., 489 ; *Hooks vs. Graham*, 23 Ill., 81 ; *Wallace vs. Hall*, 19 Ala., 367 ; *Blair vs. Harrison*, 11 Ill., 384 ; *Summers vs. Babb*, 13 Ill., 483 ; *Tompkins vs. Fonda*, 4 Paige, 448.

This, we believe, is the first instance in the judicial history of this District where dower rights, before assignment, have been sold for the satisfaction of creditors ; the text-writers and the reports everywhere seem to be silent on the subject. There would seem to be ^{no} precedent for the action of the court below.

Now, if a widow's dower before assignment cannot be taken and sold on execution at law, we fail to see any reason why, before assignment, an equity court can take hold of it any more than a court of law ; it certainly is not because the estate or interest is any more tangible in that form than in the other. It certainly will not be seriously maintained here that chancery trustees have more efficient means of effecting a sale of such an interest than the marshal has. In this case the widow was dowable in five separate pieces of property. The proper course for the plaintiff to have taken was, first, to have asked the court to appoint a receiver of the dower interest in this property ; then that the dower be assigned ; and, last of all, that it be sold.

2. Permanent improvements are to be charged to the heir and not to the widow.

The evidence disclosed the fact that the guardian had expended about \$4,000 in permanent improvements upon her ward's estate. The auditor charged one-third the cost of permanent improvements to the widow. This was error : the whole cost of these improvements should have been charged to the ward. 1 Roper H. & W., 349 ; Park on Dow.,

257 ; Kent, vol. 4, 65 ; 1 Wash. R. P., 236 ; Humphrey *vs.* Phinney, 2 John., 484 ; Hale *vs.* James, 6 John. Ch., 260 ; Catlin *vs.* Ware, 9 Mass., 218 ; Larrowe *vs.* Beam, 10 Ohio, 498 ; Thompson *vs.* Morrow, 5 Serg. & R., 289 ; Powell *vs.* Manf. & C. Co., 3 Mason, 349 ; McClanahan *vs.* Porter, 10 Mo., 746.

Mr. Chief Justice CARTER delivered the opinion of the court.

The chief questions involved in this appeal are whether, in this District, a widow's dower before assignment can be sold for the satisfaction of creditors, and whether the costs of all permanent improvements before assignment of dower should not be charged to the heir. We are of opinion that both these questions should be resolved in favor of the appellant ; the decree appealed from is therefore reversed, and the cause remanded to the court below with directions to recommit the cause to the auditor with instructions to charge the cost of all permanent improvements to the heir, and to re-examine his account on the other points excepted to and which were overruled in the court below.

POOLE & HUME vs. JOHN H. DALY ET AL.

DALY ET AL. vs. DALY ET AL.

IN EQUITY. NOS. 3032 AND 3081 CONSOLIDATED.

{ Decided April 17, 1882.

{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

1. When an attorney at law obtains a judgment in the capacity of executor, and is at the same time attorney for other parties in a suit against the same defendant, and a few days later obtains a judgment for them also, the court, in applying the proceeds of an equity of redemption, to the satisfaction of these judgments, will recognise no priority, but will distribute *pari passu*.
2. It is doubtful whether the rule heretofore frequently followed by this court of distributing the proceeds of an equity of redemption among judgment creditors in the order of their priority in obtaining their judgments, is the correct rule.
3. As to what is the rule that should be followed in such cases, *quære*.

THE CASE is stated in the opinion.

HINE & THOMAS for Poole & Hume.

W. J. MILLER in *pro. per.*

JOHN C. WILSON for Daly.

Mr. Justice COX delivered the opinion of the court.

On the fifth day of June, 1872, Mr. Wm. John Miller, a member of the bar, recovered, as executor of James Daly, a judgment against John H. Daly for \$750. Two days afterwards, June 7, 1872, Poole & Hume, merchants of this city, recovered a judgment against the same defendants for \$924.12. It appears that the only real estate which the defendants owned consisted of an equity of redemption in an undivided interest in certain lots in this city which he held as one of the heirs-at-law of his father, James Daly. On the 30th of December, 1872, Poole & Hume filed a bill against John H. Daly, in the nature of a creditor's bill, professedly for their benefit as well as for the benefit of those of his other creditors who might come in and participate in the expenses of the suit. The object of the bill was to apply the equity of redemption of John H. Daly to these two judgments. No other steps were taken in this suit except one which will be referred to. Afterwards there was a partition suit between the heirs-at-law of James Daly, to which

John H. Daly was a party, the object being to distribute the proceeds of the property among them. Some time afterwards an order was passed in the two suits consolidating them and giving the judgment creditors the right to share as might be proper in the proceeds when sold under the partition suit. Mr. Miller, the executor, had filed his petition as a judgment creditor, coming into the partition suit, and offering to bear his share of the expenses of the suit, evidently intending to file it in the creditor's suit, but having obtained a judgment, he would get the same benefit under the order consolidating the two cases, as he would have had if he had been originally a party to the creditors' suit. The court below followed the rule that the judgment creditors were entitled to be paid in the order of their priority, and applied the proceeds to the senior judgment of Mr. Miller, which consumed the whole of the proceeds. This was excepted to by Poole & Hume, and the case comes before us on that exception.

There are three rules in relation to the distribution of the proceeds of an equity of redemption, which have more or less foundation in authority, and were referred to by counsel in the very full discussion which was had of this case. The first, and the one followed by the court below, is that the judgment creditors must be satisfied in the order of their priority in obtaining their judgment. The second is that the creditor who first files his bill, although a junior judgment creditor, shall be satisfied in full as a reward for his diligence. The third is that the proceeds shall be treated as equitable assets, and distributed *pari passu* among all the judgment creditors. We have had great difficulty in deciding that either one is the final rule for this jurisdiction. In many cases the first rule has been followed as such by the court, but we find, on looking into the matter, that there is great doubt as to the weight of authority in favor of that rule. In a later decision of the Supreme Court of the United States, the court modifies the rule considerably, but we do not propose in this case to decide on any of these as the final definite rule on the subject, but to dispose of the mat-

ter on considerations peculiar to it. It appears that both of these suits were originally in the hands of the same attorney on the common law side of the court ; and it further appears that both of them were ripe for judgment at the same time. Mr. Miller, who, in his representative capacity, appeared as plaintiff in one case, was the attorney for the creditors in the other and we think that the relation between him and them was one involving some obligations ; we conceive that they did not intend to waive any of their rights, but considered that they were entitled to have their judgment entered on the same day as the other creditor whom they employed to appear for them. They could not, however, expect their attorney to give them priority over himself. Without, therefore, determining the question, because we consider it unnecessary to be determined, as to which one of the three rules referred to is to govern us, we shall reverse the decree below, and order the proceeds of this sale to be divided, as seems to us according to the plain justice of the case, *pari passu*, between these creditors.

The cause will be remanded, in order that such a distribution may be made.

UNITED STATES, EX REL. JOHN THOMPSON,

vs. .

DENT ET AL., COMMISSIONERS OF THE DISTRICT OF COLUMBIA,

AT LAW. No. 23,009.

{ Decided April 17, 1883.

{ THE CHIEF JUSTICE and Justices COX and JAMES sitting.

1. The certificates of drawback issued by the District of Columbia, under the act of Congress of June 19, 1878, to holders of certificates of indebtedness for improvement assessments do not bear interest.
2. Statutes which are enacted as compromises in regard to matters of taxation, and which subject the municipality to obligations which did not exist before, are to be construed so that these new obligations shall not be made larger than the strict and precise terms of the statute require.

STATEMENT OF THE CASE.

This was an application for a writ of mandamus against Josiah Dent, Thomas P. Morgan, and Wm. J. Twining. Commissioners of the District of Columbia, commanding them to issue to the petitioner seventeen drawback certificates of the District of Columbia, bearing ten per cent. interest until paid, under the act of Congress of June 19, 1878.

The petition set out at great length the acts of Congress and of the District legislature, under which the original assessment was made, and the certificates issued, together with a history of the litigation growing out of the late action of the board of public works in making the assessments.

The following is the form of the certificate issued by the board and received by the relator :

“ Certificate of Indebtedness.

“ DISTRICT OF COLUMBIA,

“ BOARD OF PUBLIC WORKS.

“ Be it known, that the Board of Public Works of the District of Columbia having assessed upon lot No. —, in square No. —, in the city of Washington, in said District, the sum of —, for its proportionate amount of the cost of improvements upon — street, —, issue this certificate

of indebtedness against said property for said sum, with interest at the rate of ten per centum per annum from the date hereof until paid. Said assessment and this certificate constitute a lien upon said property.

"This certificate is issued in accordance with an act of Congress of the United States, entitled 'An act to provide a government for the District of Columbia,' approved February 21, 1871. And an act of the legislative assembly of the District of Columbia, entitled 'An act prescribing the mode of assessments for special improvements and providing for the collection thereof,' approved August 10, 1871; and also an act of said legislative assembly, entitled "An act amendatory of an act entitled 'An act prescribing the mode of assessments and providing for the collection thereof, approved August 10, 1871,' approved August 23, 1871.

"Given under our hands, in the city of Washington, D. C., this — of —, eighteen hundred and seventy —.

" — — — — —,

" *Board of Public Works, D. C.*"

The petitioner claiming title to a number of these certificates of assessment, alleged that the assessments had been revised under the act of Congress of June 19, 1878, and greatly reduced; that a demand had been made on the Commissioners for drawback certificates on the same for the amount of the reductions to draw ten per cent. interest, and compliance therewith refused.

F. E. ALEXANDER for relator.

A. G. RIDDLE and FRANCIS MILLER for respondent.

Mr. Justice JAMES delivered the opinion of the court.

The relator prays that the Commissioners of the District of Columbia be compelled by a writ of mandamus to issue to him certificates of drawback, providing on their face for the payment of interest on the amount of the drawback at the rate of ten per centum per annum.

It appears that the legislative assembly, by an act of August 10, 1871, purporting to be authorized by section 37

of the organic act, provided for certain improvements of streets in Washington, and for assessment of the cost thereof upon the property bordering on these improvements, to be made according to the section of the organic act referred to. That section itself only provided that assessments should be made "in the manner required by law," and, as no other law provided how they should be made, they could not be made in accordance with the authority of the organic act. They were actually made, therefore, only in a manner provided by a rule adopted by the board of public works. In the litigation which naturally followed, they were found not to have been made "in the manner required by law." Congress then came to the relief of the District and of the property-owners, and it was provided by the act of 1878, that the assessments made by the board of public works should stand as valid and should be enforced, except in cases where they should be complained of and revised and corrected. The precise form of that provision was, that the assessments should be enforced, "Provided, that upon complaint being made to the Commissioners within thirty days from the passage of this act, of erroneous or excessive charges in respect to any of said assessments which remain unpaid, said Commissioners are hereby authorized to revise such assessment so complained of and to correct the same; and where certificates of assessment have been issued, they shall issue to the holder of such certificates a drawback certificate for the amount of such erroneous or excessive charges, which certificates shall be received at any time in payment of assessments for special improvements, and they shall be redeemed in the manner prescribed for the redemption and purchase of certificates as provided by an act of the legislative assembly of May 29, 1873."

By this act Congress authorized the Commissioners to reduce the burden of the property-owner, and to give to the holder of any certificate, which had been used upon the erroneous or excessive assessment, a drawback, which should be received in payment of special improvement assessments,

or redeemed by the District in a certain manner. The terms of this certificate of drawback are the subject of dispute.

It is insisted that, as the original certificates of indebtedness provided for interest at the rate of ten per centum, and were charged as liens upon the property benefited, this validating law must be held to have contemplated that the purchaser of this charge should not suffer by its reduction; in other words, that it must be held to have intended that the drawback should operate just as the original certificate had done, and was, therefore, to bear interest at the same rate. In order to lay a foundation for this proceeding, the relator made a demand on the Commissioners for certificates expressed in accordance with this theory.

The provision of the validating act of Congress is, strictly, that the certificate of drawback should be co-extensive with the reduction made on complaint of the property-owner. The language of the act is, that "upon complaint being made to the Commissioners * * * of erroneous or excessive charges in respect to any of said assessments which remaind unpaid, said Commissioners are hereby authorized to revise such assessments so complained of and to correct the same; and where certificates of assessment have been issued, they shall issue to the holder of such certificate a drawback certificate for the amount of such erroneous or excessive charges." The certificate of drawback was to be for this and for nothing more. For this amount only, and not for this amount and whatever interest might have accrued thereon at the rate of ten per centum per annum, it was receivable in payment of special improvements. The use to be made of it, and the fact that the act omits to state that the drawback should bear interest until paid or used, show conclusively that the act did not intend that the drawback should be an interest-bearing debt.

It must be remembered that, before the passage of this act, the District, although it had sold these original certificates of assessment, was in no sense a debtor to the holder of them, and that the property on which they were liens was his only debtor. It must also be remembered that, without

a validating act of Congress, even this security appeared to be invalid. When Congress undertook, in such a state of things, to give relief to all the parties, by lifting from the property erroneous or excessive burdens, and give validity to a part of the hitherto insecure lien of the certificate of indebtedness, and by providing that the rest of the certificate, which was no longer a lien should be available against the District, as if it had been originally a debt of the District, it is manifest that the whole transaction must be treated as a compromise adjustment, in which the original condition of the parties are to some extent put aside. Compromises of this sort are to be construed strictly; especially when the adjustment subjects the District to obligations which never existed before. The obligation to receive these drawbacks for improvement assessments and to redeem them placed the District in the position of debtor to that extent, and this new obligation is not to be made, by construction, larger than the strict and precise terms of the statute requires us to make it. If the statute omits to provide expressly that this new obligation is to carry interest, we are bound to hold that this new indebtedness was to be a debt without interest.

JOHN PATCH vs. ELIAS E. WHITE.

AT LAW. No. 20,463.

{ Decided April 17, 1882.

{ The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

A will contained the following clause: "I bequeath and give to my dearly beloved brother, Henry Walker, forever, lot No. 6 in square 403, together with the improvements thereon erected and appurtenances thereto belonging." The testator did not own lot 6 in square 403; but the plaintiff, in an action of ejectment to recover lot 3 in square 406, offered to show by parol evidence, that this clause was intended as a devise of lot 3 in square 406. The evidence proposed to be given was: 1. That the testator intended to leave everything he owned to his brothers and sisters; 2. That he did not own lot 6 in square 403, but that he did own lot 3 in square 406, which was in the same general system of lots, all the four hundred series running down in the same straight line through that part of the city; 3. That the lot designated in the will had no improvements upon it, whereas lot 3 in square 406 was improved (the lot devised being described in the clause quoted as an improved lot). He also offered to prove, as going to show the proper reading of the clause as understood by those directly interested, that since the will was admitted to probate, the widow who had a life estate in one-third of all the property, had drawn but, one-third of the rents, issues and profits of lot 3 in square 406, and that the guardian of Henry Walker had drawn the other two-thirds, and that all the beneficiaries of the will had acquiesced in this. *Held*, inadmissible.

THE CASE is stated in the opinion.

R. T. MERRICK and CALDERON CARLISLE for plaintiffs.

WALTER D. DAVIDGE and GORDON & GORDON for defendants.

Mr. Justice HAGNER delivered the opinion of the Court :

This is an action of ejectment instituted by Patch against White to recover two undivided third parts of lot No. 3, in square 406, in the city of Washington. At the trial, the plaintiff, to maintain his action, offered in evidence a deed to himself in 1873, from Brereton, one from the heirs of Sewell to Brereton in 1851, and a deed to Sewell from Henry Walker, bearing date 1842. Each of these deeds purported to convey the entire title to lot No. 3. To prove title to the property in Henry Walker, the plaintiff then offered in evidence the will of James Walker, dated September 17, 1832, and duly admitted to probate. In this will, after a devise of one-third of his real estate to his widow for life, with a remainder to his infant son, James Walker, the testator, devised the lot of ground in controversy as follows:

"I bequeath and give to my dearly beloved brother, Henry

Walker, forever, lot No. 6, in square 403, together with the improvements thereon erected and appurtenances thereto belonging."

The testator did not own the lot herein described, but the plaintiff offered evidence which he insisted, if admitted, would enable the court to say that this clause should be considered as in fact a devise of lot No. 3 in square 406. The parol evidence that was proposed to be given was, first, that the testator, James Walker, intended to leave all his land and everything he had to his brothers and sisters; secondly, that he did not own lot 6 in square 403, and that he did own lot 3 in square 406, which was in the same general system of lots, all the four hundred series running down in the same straight line through that part of the city; that the lot designated in the will had no improvements upon it, whereas lot 3 in square 406, mentioned in the declaration, was improved, (and the lot devised is, in the clause just quoted, described as an improved lot). He then offered to prove that, since the will was admitted to probate, Mrs. Walker, who had a life estate in one-third of all the property, had continued to draw one-third of the rents, issues and profits of the lot named in the declaration, that is to say, of lot 3 in square 406, and that the guardian of Henry Walker, during his minority, had drawn the other two-thirds of the rents of that lot, and that all the beneficiaries, the people named in the will, had acquiesced in this, going to show the proper reading of that clause, as understood by those directly interested.

The question is, whether this evidence is admissible or not. It is not improbable that this may have been a case of misdescription through a blunder of the testator, or his scrivener, confusing the numbers of the lot and the square by a sort of jingle. He seems originally in his description of his land to have made other blunders in the will. Thus, he gave his son, James Walker, "lot number 22, in square number three two hundred and twenty, fifty-two." This was a very strange blunder; in fact, he seems to have been a man very likely to blunder, but it is to be observed that this last one he cor-

rected, and it may be argued that he would have corrected the first one if he had made it as well as the last, and that he might have intended to buy this piece of land before he died. The difficulty in these cases arises from the application of the rules governing the subject, the rules themselves being pretty plain. And, first, it is to be observed that this is not a suit seeking the aid of words not written. At the same time, however, a court of law, though precluded from ascribing to the testator any intention not expressed in his will, admit their obligation to give effect to every intention which the will, properly expounded, contains. The answer, therefore, to the question above proposed—enjoined as well as sanctioned by the general principles above mentioned—must be, that any evidence is admissible which, in its nature and effect, merely explained what the testator has written; but no evidence can be admissible which, in its nature or effect, is applicable to the purpose of showing merely what he intended to have written.”

The case of *Walton against White*, in 5 Maryland, page 297, was a case of a devise of lands which were described as being “on the south side of Beaver Dam Branch,” and the court says: “The question in expounding a will is not what the testator meant, as distinguished from what his words express, but simply what is the meaning of the words,” and they admitted evidence to show the true location of the branch. The principle is confirmed, almost in the same words, in the case of *Hammond vs. Hammond*, 55 Maryland, page 576. But, indeed, there is a perfect flood of cases, and multitudes were cited in the argument. We think, however, that the decision of the courts in the principal cases would not admit such testimony as is sought to be introduced here. Of citing cases there is no end, but it is to be observed that many of them are early cases before the statute, and are, therefore, not reliable. Such is the opinion of Redfield, Jarmen, and other text-book writers; and among those cited as being before the statute are the cases from Ambler and from Coke’s reports. All these are, therefore, not safe guides, because, unquestionably, the statute

was intended to prevent the latitude of evidence which had hitherto prevailed. On page 115 (margin) of Wigram, it is said: "The principle (if any) upon which the excepted cases, taking them collectively, are founded, is by no means obvious;" and further down, on page 116, he says: "How can the statute, which makes a writing indispensable, be satisfied, if the thing which is the subject of disposition, or the person who claims the benefit of it, is not described in that writing with certainty sufficient to enable the court, by the description in the writing, to determine their identity?" In the case of Beaumont against Fell (2 Pierre Williams), the Master of the Rolls, although he admitted the parol evidence, said: "If this had been a grant—nay, had it been a devise—of land, in equity, where 'the conscience of the heir may be affected,' in the language of the courts, 'if he shall insist upon the literal interpretation of a devise against the meaning well known to himself to have been intended by the testator.' Naturally, under such circumstances, a court of equity might be more inclined to consider the offer of such evidence than a court of law in a dry legal action like an ejectment, which is governed by technical rules. By the Statute of Maryland of 1798, ch. 101, all devises of any land, &c., shall be in writing, signed by the party devising the same, or by some other person in his presence, and by his express direction, and attested and subscribed to in the presence of the testator by three or four credible witnesses, or else it shall be utterly void, and of none effect. This clause is a literal transcript of the provision in the Statute of Frauds and Perjuries, 29 Charles II, ch. 3. Now, what was the state of the law before this statute? In Wigram on Wills, page 5, author's edition, it is thus laid down: "It was holden before the statute that parol evidence was, in certain cases, admissible to determine the person or thing intended, where the description in the instrument was insufficient for that purpose; as in a devise to A B, where there were two persons of the same name, or a devise of the manor of Dale, where the testator had two manors of that name, North Dale and South Dale, in which

cases parol evidence of witnesses who spoke to the testator's intention was admissible to determine which of the two persons named respectively A B, or which of the manors of Dale was intended by the testator. That is to say where the identity of the person or thing intended by the testator has been the only point in dispute, and the description in the will has been insufficient to determine it." And, further down, he says: "The courts have uniformly professed to be governed by the admitted principle, that, *the judgment of a court in expounding a will should be merely declaratory of what is in the instrument*. This was the general rule at common law before the statute, and if the statute has not strengthened its obligations, it certainly has not relaxed them," and, as to the effect of the statute, the author states that it, "by requiring a will to be in writing, precludes a court of law from ascribing to a testator any intention which his written will does not express, and, in effect, makes the writing the only legitimate evidence of the testator's intention. No will is within the statute but that which is in writing, which is as much as to say that all that is effectual to the purpose must be in writing, without it had been void by reason of the mistake both of the Christian and surname; but where is the distinction between a grant and a devise of land for the purpose under consideration?" This case was one where "Gertrude Yardley" was held entitled to a legacy which was given by the will to "Catherine Earnley." Again, on page 130, Wigram says: "The decisions, then, in the excepted cases must, it is conceived, be considered to a great extent as arbitrary, and not to be explained upon any determined principle. They appear to be decisions in which the general principle has been sacrificed to meet the hardship of particular cases." One of the principal cases involving the admission of parol testimony to explain what the testator meant, is the celebrated case of *Goblet vs. Beechey*, reported in 3 Simon, page 24. It is well known that the origin of Mr. Wigram's book was in his criticisms on that case, where the Master of the Rolls allowed parol evidence to explain what

was meant by a provision in the will. This ruling, however, was reversed by Lord Chancellor Brougham. After the decision in *Goblet vs. Beechey*, came the case of *Miller vs. Traverse*, in 8 Bingham. In that case the testator devised in a particular way all his estates in the county of Limerick and the city of Limerick. It appeared that the testator possessed estates in the city of Limerick, but none in the county, but that he had large possessions in the county of Clare, and the offer was made to prove that, in the original draft of his will, the devise had been of all his lands in the county of Clare and the city of Limerick, and that, by a blunder of the scrivener, the county of Limerick had been inserted for the county of Clare. This case was heard, on appeal, by Lord Lyndhurst and Lord Chief-Justice Tindal, among other judges, and their opinions were delivered at great length and after mature examination, and it was there held unanimously by the judges that such evidence was inadmissible. In 18 Howard (see, also, 11 Wharton), in the case of *Watkins against Allen*, this case of *Miller vs. Traverse* is adopted by the Supreme Court of the United States as expressing the correct position on the subject. The testator in the present case does not say that his property was in the city of Washington, and it cannot be doubted that parol evidence to that extent would be admissible by way of identifying the property named by him in the will, but the argument is that we can go further than this and correct the numbers as given for square and lot.

Now, the applicable cases seem to be confined to instances of what Lord Bacon calls "equivocation" in a will, recognizing the principle as laid down by him that parol evidence was admissible "where the persons or things may be equally designated by the same description," or where there is a description plain enough as to one part in the will and equivocal as to the other, the equivocal part may be rejected if enough remains to let us see what the testator really intended to express, or portions of the description may be rejected, provided there is something left certain, as if a man, on writing his will on the back of a deed, should say, "I give

the piece of land conveyed to me by the within deed containing 100 acres, lying in the county of Dale," &c., he may have number of acres wrong, he may have the county wrong, and he may have the position wrong, and the name may be incorrect, and yet such a devise may be sustained, because a sufficient description of the property intended is evinced by his declaration that it is the property conveyed by the deed that is pointed out in the will—in other words, one thing may be incorrect and be corrected by another, if there is anything to correct it by. In the case of *Wilkins et al. vs. Allen*, 18 Howard, page 285, the whole matter is decided on the strength of this English decision.

Now, applying these principles here, what can we do with the devise of this lot? The will says, "lot 6, in square 403," and it is said that ought to be read lot 3 in square 406. The first thing to do then is to strike out the number of the lot and then to strike out the number of the square. What then remains? Nothing on earth but these "improvements." It is manifest that this will was not drawn by a lawyer; it jumbles "improvements" and appurtenances together, and leaves out words of limitation, and makes other blunders all the way through, and to admit parol testimony to give effect to the blunders of this man is to do the very thing which the statute was designed to prevent. The recent important cases seem to be within the principle I have just enunciated. For instance, a New Hampshire case where the property was described wrongly, but was identified as "the piece I bought of A;" a case reported in 2 Washington's Reports, where "a lot on Fourth street in the occupation of A and B," was held to pass a lot on Third street in the occupation of the persons named; a case in Indiana, where the northeast quarter of a township was devised and the northwest quarter was held to pass, the rest of the description being there sufficient; the case in 20 Missouri, on page 239, where the sections devised were right, but the township wrong, and the property was identified in the will by its accessibility to the "Big Spring;" the case of *Fitzpatrick vs. Fitzpatrick*, in 36 Iowa, where the testatrix de-

vised the west half of the northeast quarter, which she did not own, instead of the east half of the southwest quarter, which was her property, and where the plaintiff offered proof that a similar mistake to that insisted on in the case of *Miller vs. Traverse* had occurred, and to prove by the scrivener that the description originally given to him was the correct one, but the offer of parol proof was rejected. In the case of *Wethersee's Lessee vs. Bascoville*, the circumstances were quite touching ; a settler in the far west, killed by Indians, while dying had at the door of his cabin dictated his will to a neighbor ; it happened that, possibly through want of familiarity with the subject, the scrivener incorrectly recited the instructions of the testator, and this fact was so evident that the heirs for many years had held the property among themselves according to the verbal directions of the testator, and against the written devises in the will. When, however, a claim was made under the language of the will, the Supreme Court held that parol evidence of what the testator directed the scrivener to write was inadmissible and that the devises, as expressed in the will were conclusive upon the rights of the parties. It results, in the language of the court in the case of *Jackson vs. Van Vachten*, in 11 John., page 201, that " in cases of this kind, where there is no sufficient description in the will, independent of that which is false, the devise fails for uncertainty. It would be impossible for counsel ever to advise with confidence as to a title derived under a will if, as in the present instance, after the expiration of nearly fifty years, it is admissible by parol evidence to prove that a devise of property distinctly described in the will, was in fact a devise of another portion not named in the will and differing in location and in all other points of description, and if, under the sanction of this statute of frauds, such evidence is to be admitted, we may well, in the language of an English judge, say that its title should be changed and that it should be called "an act for the promotion of fraud and the encouragement of perjuries."

The rulings below are affirmed.

The CHIEF JUSTICE dissented.

GEORGE T. JONES vs. WILLIAM W. WARDEN.

IN EQUITY. No. 7389.

{ Decided April 18, 1883.
{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

Plaintiff filed his bill to obtain the surrender of a certificate of stock. He alleged that the defendant obtained it from him with the understanding that it was to be used for the purpose of exercising, in some way, an improper influence with certain officials of the government to inure to the benefit of plaintiff and defendant.

Held, That on plaintiff's own statement equity would deny him relief.

THE CASE is stated in the opinion.

S. S. HENKLE and JOHN E. NORRIS for plaintiff.

BIRNEY & BIRNEY for defendant.

Mr. Justice JAMES delivered the opinion of the court.

The plaintiff states in his bill that he holds a promissory note of the defendant for \$4,629.96, and that the defendant undertook to secure the payment of it by depositing with him two certificates of stock of the Columbian Bank Note Company ; that afterwards defendant came to him with reference to a matter which the company had before the Treasury Department, and fraudulently and falsely represented to him that he, defendant, had great influence with the Secretary of the Treasury, and by deception, and with fraudulent intent and purpose, induced the plaintiff to loan him temporarily one of these certificates, and that he now refuses to return the same. His bill concludes with a prayer that the defendant be required to surrender the certificate, or if sold, for its value and for general relief. The defendant, in his answer, denies that he falsely represented that he had great influence with the Secretary of the Treasury, and in short, denies that he did any of the fraudulent things, charged. The plaintiff does not state in so many words that Warden made these statements knowing that he had not great influence with the Secretary of the Treasury, but does say that he pretended that he had. Testimony was taken on both sides. Jones, as a witness in his own behalf, merely stating his story over again, says that the defendant repre-

sented to him that it was important to show to the Secretary of the Treasury that he, defendant, was a stockholder in the company, and that he wanted one of his certificates of stock to show to the Secretary, in order to convince him of that fact. The defendant, on the other hand, appearing as a witness on his own behalf, swears that the plaintiff, wanted him to perform certain services for the company, and that the plaintiff, being largely interested in whatever the company might achieve, was willing to pay him a fee, and that he agreed to compensate him by giving him at once, as a retainer, one of these certificates.

It appears, therefore, that the answer completely denies, under oath, the allegations of the bill, and that the defendant, as a witness, as completely contradicts the story of the plaintiff as a witness, and to the defendant's testimony is added that of his son, which, though not very definite, seems to sustain in rather a general way the story of the defendant. It seems that a contract made with the Columbian Bank Note Co. by a former Secretary of the Treasury had been rescinded by his successor, and that the object of the defendant's services was to persuade the new Secretary to revoke that order and restore the contract. Now for that purpose it was entirely unnecessary for the defendant to appear as a stockholder ; he could make his argument just as well in his capacity as a lawyer, as in his capacity as an owner of stock. But the plaintiff avers that he understood the defendant's purpose in obtaining the certificate was that it might be used in some way to obtain that which argument could not secure. If the certificate was to be put to such a use it was clearly to exert an improper influence, and the plaintiff in his own statement would be left by a court of equity just where it found him. But the plaintiff's case is, as we have seen, wholly denied by the answer, and his testimony is in the same manner denied by the defendants's testimony, with some little addition from that of his son. The bill might here be dismissed, but as the question of ownership of this stock does not seem to be clearly raised, and as we have some doubt as to who in the end should be entitled

to it, we are not willing to conclude the plaintiff by our inability to give relief, if he should show a case entitling him to any ; we will therefore dismiss the bill without prejudice.

GEORGE W. PHILLIPS, RECEIVER,

vs.

S. S. SMOOT AND ALEXANDER R. SHEPHERD.

AT LAW. No. 15,191.

{ Decided May 1, 1882.

{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

1. Plaintiff sued defendant as guarantor, declaring on a paper purporting to be the guaranty of the defendant and described it as bearing date November 13, 1874. The principal contract bore date November 13, 1874, and was signed by the principal only: at the foot thereof, and on the same sheet of paper, was the contract of guaranty signed by defendant only; it bore no date, but referred in its terms to the principal contract; it was proven by parol evidence that both contracts were signed the same day.
Held, That these contracts were separate instruments and that the guaranty being signed by a different party did not take its date from the principal contract; as it was not dated, it, therefore, did not conform to the paper described in the declaration and was not admissible in evidence to prove the contract of the defendant.
2. A receiver appointed to take possession of property, but required by the order appointing him to give bond before proceeding to act, cannot, until such bond is given, legally dispossess a party in possession.
3. If a party being rightfully in possession of real estate, sign a lease agreeing to pay rent to one whom he supposes to be a receiver with authority to take possession of the property, he is not estopped from afterwards showing the want of authority and title on the part of the lessor; such a case does not come within the rule that the tenant shall not deny the title of his landlord.

STATEMENT OF THE CASE.

MOTION for new trial on exceptions.

The plaintiff began this suit by filing the following declaration entitled as above :

“ The plaintiff is receiver in a certain cause pending in the Supreme Court of the District of Columbia between Hugh A. Maughlin, plaintiff, and Charles H. Winder et al., defendants, said cause numbered 4002, Equity docket 14, and sues by virtue of a certain decree passed in said cause on

the 13th day of November, A. D. 1874, and a certain other order made therein on the 13th day December, 1875.

“And the plaintiff sues the defendants for that the plaintiff did on the 13th day of November, A. D. 1874, at the city of Washington, District of Columbia, demise that certain dwelling house and premises numbered, &c., in the city of Washington, to the defendant, Samuel S. Smoot, to hold and occupy the said premises at a monthly rental of \$166.66 $\frac{2}{3}$ to be paid on the last day of each calendar month as long as said renting should continue, in consideration whereof the said defendant, Samuel S. Smoot, by his deed dated on said 13th day of November, A. D. 1874, at the city of Washington, in the court to be produced, covenanted to pay to the plaintiff the sum of \$166.66 $\frac{2}{3}$ on the last day of each calendar month so long as the said renting should continue.

“And the defendant, Alexander R. Shepherd, by his deed dated said 13th day of November, A. D. 1874, at said city of Washington, in court to be produced, covenanted and agreed in consideration of said letting from the plaintiff to the defendant, Smoot, to assure and guarantee, and did in fact assure and guarantee, to the plaintiff the prompt payment of the rent covenanted to be paid by the said defendant, Smoot, as hereinbefore set forth. And the plaintiff avers that the defendant, Smoot, took possession of said premises and still continues in possession thereof, and further the plaintiff says there is now due him as rent under said lease the sum of \$1,666.66 $\frac{2}{3}$ with interest on the same as follows: On \$166.66 $\frac{2}{3}$ from March 31, 1875; on \$166.66 $\frac{2}{3}$ from April 30, 1875; on \$166.66 $\frac{2}{3}$ from May 31, 1875; on \$166.66 $\frac{2}{3}$ from June 30, 1875; on \$166.66 $\frac{2}{3}$ from July 31, 1875; on \$166.66 $\frac{2}{3}$ from August 31, 1875; on \$166.66 $\frac{2}{3}$ from September 30, 1875; on \$166.66 $\frac{2}{3}$ from October 31, 1875; on \$166.66 $\frac{2}{3}$ from November 30, 1875; on \$166.66 $\frac{2}{3}$ from December 31, 1875.

And plaintiff avers that demand has been made upon the said defendants, Smoot and Shepherd, for the payment of the said sum due as aforesaid, but that the same has not been paid nor any part thereof. Wherefore the plaintiff

claims the said sum of \$1,666.66 $\frac{2}{3}$ with interest thereon as aforesaid and costs.

To this declaration the defendants pleaded separately. Smoot pleading :

1st. *Non est factum.*

2d. At the time of bringing this suit defendant held the right to, and the possession of, said premises, of which he had not been divested, and said lease passed nothing to him.

3d. The said lease was executed by the plaintiff without authority and is void in law.

Issue was joined upon the first plea and to the second and third pleas plaintiff replied :

That the said defendant accepted possession of the demised premises from the plaintiff under the lease declared upon and is estopped from disputing the lessor's title.

Upon this replication issue was joined, Shepherd pleaded :

1st. *Non est factum.*

2d. Want of notice of Smoot's failure and default.

Issue was joined on the first plea and to the second a demurrer was interposed which at the trial was sustained.

On the trial plaintiff offered in evidence the following paper writings purporting to have been executed by the defendants to plaintiff :

"This indenture made this 13th day of November, A. D., 1874, between George W. Phillips, receiver in a cause pending in the Supreme Court of the District of Columbia, numbered 4002, Equity Dock., of the first part ; and Samuel S. Smoot, of the city of Washington, District aforesaid, of the second part, witnesseth that the said party of the first part hereby leases to the said party of the 2d part the premises numbered 211 4 $\frac{1}{2}$ street, northwest, in said city of Washington, at a monthly rental at the rate of \$166.66 $\frac{2}{3}$, to be paid on the last day of each calendar month so long as said renting shall continue.

"In case the said rent, or any monthly payment of the same shall not be paid punctually on the day when the same shall become due, but shall remain due and unpaid five days after the same shall become due, then at the option of the

lessor, this lease shall at once cease and determine and the said receiver shall enter without previous notice of any sort, all such being hereby waived. The said party of the second part hereby agrees to pay the rent above reserved promptly as the same shall become due, and consents to the forfeiture and re-entry hereinbefore provided for at the option of the lessor in case of default in payment of said rent.

"It is understood by all parties that this lease shall commence from the date of this indenture this 13th day of November, 1874.

"SAMUEL S. SMOOT, (Seal,)

"G. W. PHILLIPS, *Receiver*, (Seal.)

"CHAS. H. WINDER, *Witness*."

At the foot of this lease and on the same sheet of paper was the following :

"I, Alex. R. Shepherd, of the city of Washington, D. of C., in consideration of the letting aforesaid, do hereby assure and guarantee to the lessor named in said lease the prompt payment of the rent reserved therein, and in case the same is not paid by the said lessee, I hereby make myself responsible for the same, and I consent that the clause therein providing for a forfeiture shall apply at the option of the lessor and at his option only.

"ALEX. R. SHEPHERD. (Seal.)

"CHAS. H. WINDER, *Witness*."

The defendant objected to the admission of either of these instruments, but the objection was overruled by the court.

Plaintiff then testified that after his appointment as receiver he visited the premises described in the declaration which he found in the possession of the defendant Samuel S. Smoot, that thereupon he informed Smoot of his (plaintiff's) appointment, and said to him that unless he at once gave him a lease with good security he would dispossess him, and the same day the lease and guaranty of the defendants were furnished, that several months rent was paid by Smoot, but that all the rent claimed was due and unpaid. The order of the court in equity authorizing and directing plaintiff to

sue was introduced, and plaintiff, after admitting that he had *never given bond* as receiver in said equity cause, rested his case.

Defendant then offered in evidence the order appointing plaintiff receiver. This order, which was entitled in the equity cause, and dated November 13, 1874, after appointing the plaintiff receiver and declaring that "as such receiver" he is authorized and directed to demand and recover possession "of the premises in question" and to rent the said premises and receive rents therefor, "and further ordered" that the said receiver *before proceeding to act as such* file in this court his bond with surety to be approved by the court, conditioned in the penal sum of two thousand dollars, for the faithful performance of his duties as said receiver."

The defendants then rested, and thereupon requested the court to instruct the jury as follows :

"If the jury find from the whole evidence that the order appointing the plaintiff receiver, provided that before proceeding to act as such, he should file a bond with surety, to be approved by the court, conditioned for the faithful performance of his duties as said receiver, and that the plaintiff never complied with said order by filing such bond, and they further find that the defendant, Smoot, was in possession of said property, and that the defendants executed said lease and guaranty under mistake and misapprehension of the authority of said receiver, the plaintiff is not entitled to recover."

The court, however, refused to so instruct the jury, but directed a verdict to be rendered for plaintiff, which was accordingly done. To the refusal of the court to exclude the lease and guaranty as evidence and to instruct the jury as prayed, and to the instruction of the court to the jury to find for plaintiff, the defendants excepted and moved in general term for a new trial.

A. C. BRADLEY for defendants :

1. The contract of guaranty was improperly admitted in evidence in support of the second count of the declaration :

Because it is averred that "defendant, Shepherd, by his deed dated said 13th day of November, A. D. 1874," and the same is not dated. 1 Ch. Pl., 16 Am. Ed. Perkins, 318. 1 Greenl. Ev., sec. 56, 58, 61; Lord Raym., 1043; 2 Campb., 307, note; 4 East Rep., 477; *Stephens vs. Graham*, 7 S. and R., 505; *Church vs. Fetterow*, 2 Pa., 301; *Metcalf vs. Standeford*, 1 Bibb., 618; *Grant vs. Winn et al.*, 7 Mo., 188.

Because there is a further variance between the statement of the contract in the declaration and the proof. 1 Ch. Pl., 268-9, and cases 316-7; 1 Greenl. Ev., 58, 66, 69.

2. The plaintiff had no title, or authority as receiver, because he never complied with the order appointing him, by executing the required bond. *Thompson on Prov. Rem.*, 478, 480, 481; *Edwards on Recrs.*, 98 and 99; *High on Recrs.*, sec. 121; 1 Sm. Ch. Pr., 628, 635; *Banks vs. Potter*, 21 How. Pr., 471-2; *Winchester Tr., vs. The Union Bank of Balto.*, 2 G. and J., 73, 79; *Johnson vs. Martin*, 1 *Thomp. & Cook*, (N. Y.), 504.

3. Defendant Smoot is not estopped to avail himself of the want of title and authority in the receiver, because he was in possession of the property, of his own right, and whilst in possession, was induced by the representations and threats of the receiver, and under mistake of his authority, to take a lease from him. *Bigelow on Estoppel*, lix., 356-360, 364; *Tewksberry vs. Magraff*, 38 Cal., 237; *Swift vs. Dean*, 11 Vt., 326; *Shultz & Hurd vs. Elliott*, 11 *Humph.*, 183; *Cornish vs. Searall*, 8 B. & C., 471; *Franklin vs. Merida*, 35 Cal., 558; *Miller vs. McBrien*, 14 S. & R., 382.

It is immaterial so far as this defense is concerned, whether the lease is parol or under seal, see *Bigelow Estop.*, lix, 348, 350, 352.

And moreover, the estoppel pleaded is only an estoppel in pais.

4. Defendant Shepherd is not estopped to deny the title and authority of the receiver: because as to him there can be no estoppel in pais. *Bigelow Estop.*, 75, xlix.

And there is no estoppel by deed: and, moreover, he does

not deny any statement or recital in the deed. *Kepp vs. Wiggett*, 10 C. B., 35.

JAS. G. PAYNE and R. ROSS PERRY for plaintiff.

Mr. Justice JAMES delivered the opinion of the court :

It appears in this case that in a certain chancery suit the plaintiff, Phillips, was appointed receiver of the property involved therein, with direction "that the said receiver, before proceeding to act as such, file in this court his bond with surety to be approved by the court." Without filing his bond as required he called upon Mr. Smoot, who was in possession of the premises, to attorn to him, saying that if he did not he would turn him out. Thereupon an arrangement was made by which Smoot was to pay \$166.66 $\frac{2}{3}$ per month rent and to take a lease, which was dated the 13th of November, 1874. That lease runs in the following words:

"This indenture made this 13th day of November, A. D., 1874, between George W. Phillips, receiver in a cause pending in the Supreme Court of the District of Columbia, numbered 4002, Equity Doc., of the first part ; and Samuel S. Smoot, of the city of Washington, District aforesaid, of the second part, witnesseth that the said party of the first part hereby leases to the said party of the second part, the premises numbered 211 Four-and-half street, northwest, in said city of Washington, at a monthly rental at the rate of \$166.66 $\frac{2}{3}$, to be paid on the last day of each calendar month so long as said renting shall continue.

"In case the said rent, or any monthly payment of the same shall not be paid punctually on the day when the same shall become due, but shall remain due and unpaid five days after the same shall become due, then at the option of the lessor, this lease shall at once cease and determine and the said receiver shall enter without previous notice of any sort, all such being hereby waived. The said party of the second part hereby agrees to pay the rent above reserved promptly as the same shall become due, and consents to the forfeiture and re-entry hereinbefore provided for at the option of the lessor in case of default in payment of said rent.

"It is understood by all parties that this lease shall commence from the date of this indenture this 13th day of November, 1874.

"SAMUEL S. SMOOT, (Seal.)

"G. W. PHILLIPS, *Receiver*. (Seal.)

"CHAS. H. WINDER, *Witness*.

Mr. Phillips required that Smoot should give security. On the same paper, therefore, with this lease the defendant Shepherd signed the following :

"I, Alexander R. Shepherd, of the city of Washington, D. of C., in consideration of the letting aforesaid, do hereby assure and guarantee to the lessor named in said lease the prompt payment of the rent reserved therein, and in case the same is not paid by the lessee, I hereby make myself responsible for the same, and I consent that the clause therein providing for a forfeiture shall apply at the option of the lessor and at his option only."

This is simply signed Alex. R. Shepherd, with a witness.

That paper itself is not separately dated, while the lease, just below the foot of which this paper of Shepherd's is written, is dated November 13th, 1874. It was proved that the signature of Shepherd was made on the same day with the other. The plaintiff has joined these two parties as joint obligors, and has set forth that Shepherd, by a deed of a certain date, given plaintiff, undertook as that paper sets forth.

The first question presented, is whether this paper conforms to the description in the declaration. The plaintiff testifies that it is a paper dated the 13th of November, 1874. Unless it is so dated, under a proper construction of these two papers, it is not the paper declared on. We are unanimously of opinion that these are separate instruments. They are signed, one by Smoot and the other by Shepherd. And although Smoot's paper is dated, the other is not, for, being a paper containing a signature of another party, and being an instrument of itself, it does not take its date from

the former. Nor does not in its terms embody the other in such a way as to show that it is part of that other. It refers to another paper and adopts some of its terms, but we do not think that makes it the same instrument, any more than a page which refers to some other page is a part of the page referred to. It was error, therefore, to admit it in evidence.

There is another point to which we might speak as we have no doubt on the subject. It is the question as to the right of the receiver to maintain his action as landlord.

It is claimed that inasmuch as Smoot took possession under this alleged lessor he is estopped to deny title. We are of opinion that until the receiver had given his bond he had, as against Smoot, no right of possession.

The court directed that the receiver should take away Smoot's possession and hold the property for the court. Until his possession should be taken away, in strict pursuance of that order, he was rightfully in possession. Therefore, when the receiver demanded of Smoot that he attorn to him, he made the demand upon a man who was there claiming to be in possession of his own right. He could not be displaced until the order of the court appointing the receiver was complied with, to wit, that before the receiver should act as such he should give bond.

That being their situation, the receiver, having given no bond, had no legal right to the possession, and the defendant being in possession as of his own right when that demand was made on him, it cannot be said, in law, that in making this lease he took possession under the receiver; all he did was to use *words*, he did no *act*. We do not think that the circumstances of this case bring it within that well-known class of cases which declare that if a person goes into possession under another he cannot deny his title.

The result of our conclusion is, that the judgment must be reversed and the case remanded.

NIKLAUS JOST ET AL. vs. ABRAHAM JOST ET AL.

IN EQUITY. No. 7,501.

{ Decided May 5, 1882.

{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

2. Where a particular estate is devised to one with remainder to the devisor's *heirs-at-law*, the remaindermen take the same estate which the law would have cast upon them if the devisor had died intestate as to the remainder. And in such case, for the purpose of ascertaining the heirs, the will is to be regarded as a nullity.
2. A treaty between the United States and a foreign power, if valid, is as much a part of the law of the land as the common law or statutes.
3. Under the treaty of 1850, between Switzerland and the United States, citizens of Switzerland may inherit of citizens of the United States in the same manner as any other citizens of this country.

THE CASE is stated in the opinion.

R. D. MUSSEY for plaintiffs :

Our contention is that, immediately upon the re-marriage of Mrs. Jost, the title to the realty theretofore enjoyed by her, vested in them, subject to a charge made by the will of \$144 a year during his life in favor of Abraham Jost. We submit the following points :

I. A fair construction of the will charges the annuity of \$144 to Abraham upon that of the testator's realty which was not given to Kiefer. [And which as a matter of fact had been held in Jost's name for Kiefer's benefit.]

II. Assuming for the present, that the plaintiffs and Abraham are equally "*heirs-at-law*" of Benedict it is fairly inferable from the will (though not free from doubt), that the testator did not intend to include Abraham among the remainder-men, after the duration of the widow's estate; for specific provision was made for Abraham of a permanent character.

III. The controversy under the will hinges upon the definition to be given to the phrase *heirs-at-law*.

The current of decisions favors a definition (when realty is spoken of), equivalent to "those who would, under the law, inherit the realty."

It should be considered, too, that wills have largely a

Roman or civil law origin. Under that law the beneficiary of the testator named in the will is an *heir*, and the *heirs-at-law* are those on whom descent would be cast if there were no will.

The plaintiffs are Swiss—friendly aliens. Under the common law descent would not be cast on them.

But the treaty stipulations between Switzerland and the United States abrogate the common law in that respect. Treaties of 1847 and 1850. See *Hauenstein vs. Lynham*, 100 U. S., 483–490, and the record of the same case in the Virginia Court of Appeals.

These treaties belong to a series of treaties of similar character made by the United States which indicate a national policy.

The Executive Departments of the United States Government have given a similar construction to them. *Foreign Relations*, 1880, 952–3.

“Heirs-at-law” is spoken of (alien) natural heirs in *Chirac vs. Chirac’s Lessees*, 2 Wheaton, 272.

The language of the will, *heirs-at-law to be divided among them in equal shares*, excludes the idea that the one naturalized heir was meant; and the pleadings and proceedings herein disclose reasons in Abraham’s mental condition why the testator should not encumber him with property.

IV. If the court hold it was the intent of the testator to convey the remainder to his foreign heirs, their alienage is no bar. See the *Spratt* cases construing the act of Maryland of December 19, 1790, in 1 Peters, 323, and 4 Peters, 892.

V. Should the court hold that the devise was to the *naturalized one* of the heirs-at-law, then it is void, and the estate passes by descent. *Phillips vs. Dashiell’s Lessee*, 1 H. & J., 478; *Medley vs. Williams*, 7 G. & J., 61; *Gilpin vs. Hollingsworth*, 3 Md., 190; *Barnitz’s Lessee vs. Casey*, 7 Cr., 464.

WM. B. WEBB, I. G. KIMBALL and W. T. S. CURTIS for defendants:

In this jurisdiction no alien could inherit lands from a cit-

izen ; he could take only by purchase. Only Abraham Jost is entitled.

1. As this is a devise to *heirs-at-law*. it is void and the heir takes by descent. *Hurst vs. Earl of Winchelsea*, 1 W. Bl., 187 ; *Scott vs. Scott*, 1 Eden., 462 ; *Ellis et al. vs. Page et al.*, 7 Cush., 163 ; *Parsons vs. Winslow*, 6 Mass., 178 ; *Whitney vs. Whitney*, 14 Mass., 90.

2. The words *heirs-at-law* designate a class and when used in a devise refer only to such persons as are appointed by law to succeed to the realty in case of intestacy. *Clark vs. Cordis et al.*, 4 Allen, 480 ; *Gwynne vs. Maddock*, 14 Ves., 488 ; *De Beauvoir vs. De Beauvoir*, 8 H. of L. Ca., 544.

A testator is presumed to use the word *heirs* in its technical sense. 2 Jarman on Wills, 1 to 5 ; *Campbell vs. Rawdon*, 18 N. Y., 417.

It is laid down, generally, in the English and American cases that a devise to "*heirs-at-law*" means to those who are such at the testator's death unless a contrary intent is clear. *Doe vs. Lawson*, 8 East., 278 ; *Bird vs. Lackie*, 8 Hare, 301 ; *Abbott vs. Bradstreet*, 3 Allen, 587 ; Judge Grier's Opinion in *Aspden's Estate*, 2 Wall., Jr., 438 ; *Porter's Appeal*, 48 Penn. St., 207 ; *Eby's Appeal*, 50 Penn. St., 311.

3. The complainants cannot take as *heirs-at-law*. An alien cannot be an heir to a citizen. *Orr vs. Hodgson*, 4 Wheaton, 453 ; *Jackson vs. Jackson*, 7 Johns., 215 ; *Smith vs. Zanes*, 4 Ala., 99 ; 1 Bacon Abr. *Alien C.*, 130 ; 1 Thomas' Coke, 100 ; 2 Black. Comm., 249 ; 3 Dessaus., 100 ; 7 Rich., 165 ; Id., 345 ; *Spratt vs. Spratt*, 1 Pet., 348 ; *People vs. Canklin*, 1 Hill, 67 ; *Fairfax vs. Hunter*, 7 Cr., 619 ; *Levy's Lessee vs. McCartee*, 6 Pet., 102.

4. If it be contended that the evident intent of the testator was to provide for his alien heirs, it is answered that this can be shown only by extrinsic evidence, and this is not a case where such evidence can be resorted to. *Miller vs. Travers*, 8 Bing., 244 ; *Bird vs. Luckie*, 8 Hare, 308 ; *Driver vs. Frank*, 3 Maule & S., 30 ; *Lomax vs. Holander*, 1 Ves., 294 ; *Fenn vs. Lownds*, 4 Bur., 2250 ; *Doe, dem. Hiscocks vs. Hiscocks*, 5 M. & W., 36 ; *Jackson vs. Hart*, 12 Johns., 88 ;

Doe, *dem.* Allen, *vs.* Allen, 12 Ad. & Ellis, 451; Doe *vs.* Brown, 11 East, 441; Mann *vs.* Mann's Exrs., 1 Johns. Ch., 236.

It remains to inquire if the bar of alienage is removed by the treaty.

The treaty can only operate upon such an estate as is the subject of escheat, and to make the treaty applicable to the estate of a citizen, it is necessary that this incident of escheat, which gives the treaty jurisdiction, shall have occurred. See Hall *vs.* Gittings, 2 H. & J., 125; People *vs.* Cutting, 3 Johns., 1; Sutcliffe *vs.* Forgey, 1 Cowen, 95; Moor *vs.* White, 6 Johns. Ch., 365; Davison *vs.* Godfrey, 4 Cr., 322; Spratt *vs.* Spratt, 1 Pet., 348.

From the nature of things the whole estate must escheat. There can be no partial escheat. Weightman *vs.* Laborde, 1 Spear, 490; Mathews *vs.* Ward's Lessee, 10 G. & J., 451; Cf. Washburn on Real Property; Greenleaf's Cruise, Vol. 8, 399.

Until, therefore, there is an entire failure of heirs there can be no escheat, and until there is an escheat there can be no jurisdiction of the treaty. But here there is an heir capable of taking. The language of the treaty is peculiar; it refers to realty that "*shall fall*" to a citizen who, by reason of his being an alien to the country where it is located cannot hold it, and provides that such estate shall not escheat as it otherwise would, but may be sold and the proceeds removed. It is not the province of a treaty to change the laws of descent of the several States of the Union. See United States *vs.* Fox, 94 U. S., 320.

Whatever view may be taken of the effect of the treaty upon the interest and estate of complainants in Benedict Jost's property, there can be no question that that instrument cannot affect Abraham's Jost's title to that property. He is an "heir-at-law," capable of inheriting from his brother, and holding the property. Such rights cannot escheat.

The treaty has recently been discussed by the Supreme Court of the United States. Hauenstein *vs.* Lynham, 100

U. S.. 483. Hauenstein was an alien holding property in Virginia. When he died his estate was taken possession of by the escheator and sold. His foreign heirs applied for relief under the treaty and were refused by the Virginia courts. The Supreme Court gave them relief but it did so entirely on the ground that Hauenstein was an alien himself, and could not transmit his estate to alien kin.

Mr. Justice Cox delivered the opinion of the court.

Benedict Jost, a citizen of Switzerland, emigrated to the United States, was naturalized and afterwards acquired real estate, by purchase, in the District of Columbia. He died September 11, 1869, after making a will, by which he devised his real estate, to which this suit relates, for the use of his wife, *durante viduitate*, with remainder to his heirs-at-law, to be divided equally between them. He left no issue, but left a widow who afterwards married again and died, and a naturalized brother residing in the District of Columbia, and several brothers and sisters and the descendants of others, who reside in and are citizens of Switzerland.

These relatives in Switzerland claim to be heirs-at-law and file this bill for a sale of the real estate and a distribution of its proceeds. The validity of this claim has been discussed and submitted for decision as a preliminary question in the cause.

The will purports to pass to the heirs-at-law just the same title which the law would cast upon them, and in such case their title is referred to the act of the law, and the will is regarded simply as a nullity. This is the case even where a particular estate is first given out of the inheritance. The will, therefore, for the purposes of the present inquiry, may be put out of the case, and the simple inquiry will be, on what persons does the law cast the title to this property?

This question must be determined on general principles by the *lex loci rei sitæ*—the law of the place where the property is situated.

By the common law, in force in the District of Columbia, the title to this property would descend to all the brothers

and sisters of the decedent, or their descendants, who have heritable blood. But by the same common law an alien is under a disability to inherit realty from a *citizen*. And no change is made in this respect by the Maryland act of December, 1791, as interpreted by the Supreme Court of the United States in *Spratt v. Spratt*, 1 Pet., 323, and 4 Pet., 392.

The question to be considered is, whether the treaty between the United States and Switzerland of 1850, which, if valid, is as much a part of the law of the land as the common law or statutes, makes any change in this respect.

The main provisions that are pertinent are contained in the 1st and 3d clauses of Article 5, which are as follows, viz.: "The citizens of each one of the contracting parties shall have power to dispose of their *personal* property within the jurisdiction of the other, by sale, testament, donation or in any other manner ; and their *heirs*, whether by testament or *ab intestate*, or their *successors, being citizens of the other party, shall succeed to the said property or inherit it*, and they *may take possession thereof*, either by themselves or by others acting for them ; they may *dispose of the same as they may think proper*, paying no other charges than those to which the inhabitants of the country *wherein the said property is situated* shall be liable to pay in a similar case.

"The foregoing provisions shall be applicable to *real estate* situated within the States of the American Union, or within the Cantons of the Swiss confederation, in which foreigners are entitled to *hold or inherit* real estate."

There is an apparent ambiguity in the first clause which, however, disappears upon a careful examination. The first sentence clearly applies only to property which a citizen of one country may leave within the jurisdiction of the other, and, as applied to this case, would only affect property which Jost, a citizen of the United States, might leave in Switzerland, and not that which he would leave here. The ambiguity in question grows out of the use of the words "said property" in the following sentences, which contain the provisions affecting this case. If the terms "said property" mean, and are confined to, property which a citizen of one

country may own within the jurisdiction of the other, this clause of the treaty fails to provide for the facts of the present case. If they simply mean the personal property, generally, of a citizen of either party, then the two clauses together—the latter extending the provisions of the former to real estate—furnish the law for this case.

The context shows that the first mentioned interpretation of the words “said property” cannot be the correct one. The sentences following the first clearly provide for the case where the decedent is a citizen of one country and his heirs of another, and where the property is situated in a different country from that of the heirs, *i. e.*, in that of which the deceased was a citizen; because it provides that the heirs in question may inherit or succeed, which was unnecessary if the property was in their own country, and that they shall be liable to no other charges than those to which the inhabitants of the country *wherein the property is situated* shall be liable in a similar case. It meets this very case. It would not be necessary for the United States to stipulate that Jost’s foreign heirs might inherit his property in Switzerland; their own laws would provide for that. But it was necessary for the United States to stipulate that those heirs should inherit the property in the United States, and might dispose of it on the same terms as inhabitants of the country where it is situated.

The clear intent of this clause of the treaty, therefore, we think, is that a citizen of one country may dispose of his property in the other, and that on his death his heirs who may be citizens of the other shall inherit his personal property wherever it may be, and the terms “said property” mean “said personal property,” without the limitation of being within the jurisdiction of the other party.

The third clause extends these provisions to real estate in States of the Union in which aliens may be entitled to *hold* or *inherit* real estate.

By the act of Maryland of 1791, before mentioned, entitled “An act concerning the Territory of Columbia and the city of Washington,” it is provided, that any foreigner may,

by deed or will, hereafter to be made, *take* and *hold* lands within that part of said territory which lies within this State, in the same manner as if he was a citizen of this State, and the same lands may be conveyed by him and transmitted to and be inherited by his heirs or relations as if he and they were citizens of this State."

It may be suggested that the words "hold *or* inherit" in the *treaty* should be read as if they were "hold *and* inherit," and that it applies only to those localities where the foreigners may both inherit and hold, or, in other words, may hold *by inheritance*, which is not provided for in the Maryland act.

It will be presently seen, however, that the treaty clearly means to give a right to inherit where it does not exist already, and also where there may be no right to hold after inheriting. It therefore cannot intend to confine its benefits to places where there is already a right to hold by inheritance.

A question may suggest itself, what is meant by the term "heirs" in the treaty. Undoubtedly, examined by the light of the common law, its language would seem somewhat incongruous. That is to say, since by the common law there can be no *alien* heirs, it would not be strictly correct to speak of heirs who are "citizens of the other party," and to provide that *heirs* shall *inherit* would sound superfluous. But it is to be remembered that the treaty employs the language not of the *common*, but of *international* law, and there is no difficulty in understanding that it refers to those on whom the local law would cast the succession, in virtue of their relationship to the deceased, if there were no disability such as that of alienage. The policy of the Government is seen, and we are assisted, in arriving at its meaning in this treaty, by a comparison of this with others; thus in the treaty with France of 1800, it is provided, that "the citizens and inhabitants of either of the two countries *who shall be heirs of goods, movable or immovable in the other* shall be able to succeed *ab intestato* (which is only another expression for "shall inherit") without being obliged to obtain letters of naturali-

zation ; * * * and also, that in case the laws of either of the two states should restrain strangers from the exercise of the rights of property with respect to real estate, such real estate may be sold or otherwise disposed of," &c., &c.

And in the treaty of 1848 with Austria, and some fourteen others with different powers, extending over the period between 1795 and 1867, it is provided that "when, on the death of any person holding real property, or property not personal, within the territories of one party, such real property *would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by the laws of the country where the property is situated*, such citizen or subject shall be allowed a term of two years to sell the same." Throughout the series of treaties those who would inherit but for the disqualification of alienage are intended to be provided for, and there can be no doubt that the same persons are designated in the treaty under consideration, under the terms "*heirs being citizens of the other party.*"

It may seem doubtful whether the Federal Government has *authority*, in virtue of the treaty making power, and, therefore, whether it could have *intended* to interfere with the laws of descent in relation to real property in the several States.

The treaties referred to recognize or create a distinction between *holding* real estate, whether by descent or otherwise, and simply *inheriting* it. They do not purport to interfere with State laws as to the *holding* of realty by aliens, but they do unquestionably purport to give a right to *inherit* where it does not exist already, to this extent and subject to this qualification, viz., that where the State laws do not permit aliens to *hold*, they still may sell the property which, if they were citizens, they might inherit and hold and realize the proceeds for their own use.

This is expressly provided in the fourth clause of section 5 of the treaty with Switzerland, as well as in the others that have been referred to. And with reference to the power of the Federal Government on this subject, it is sufficient to say, that whatever may be thought of it as affect-

ing property in the States, there can be no question about it in the District of Columbia.

We are, therefore, satisfied on the whole that the complainants are, by virtue of the Maryland act of descent, in force in the District of Columbia, and the treaty with Switzerland, heirs-at-law of Benedict Jost equally with his brother, resident here.

We have discussed the case as one of intestacy because we see nothing in the general language of the will, or the circumstances of the parties, that confines the terms employed to the foreign heirs on the one hand, or the domestic heir on the other, or gives to those terms any other effect than belongs to a general devise to an heir-at-law.

McDERMOTT BROS. vs. SARAH GARLAND.

AT LAW. No. 21,351.

{ Decided May 25, 1882.

{ THE CHIEF JUSTICE and Justices COX and JAMES sitting.

Defendant, a married woman, purchased a carriage of plaintiffs, upon credit. At the time of the purchase she stated that she was living in the country and wanted the carriage to ride backwards and forwards to look after her property in the city. *Held*, that the defendant being a married woman was not liable in an action at law; affirming and following *Schnelder vs. Garland*, *ante*, p. 350.

STATEMENT OF THE CASE.

This was an action of assumpsit against a married woman living with her husband, for the purchase money of a carriage. The testimony showed that the defendant went to the store of the plaintiffs, who were carriage dealers, and stated that she wanted to purchase a carriage, saying at the same time that she was living in the country and wanted the carriage to ride backwards and forwards to look after her property in the city. It was in evidence that she owned a house on Sixth street in this city. A carriage was accord-

ingly sold her, and some time afterwards when she was called upon to pay she said that her property was encumbered and that she was trying to straighten it out and as soon as this was done she would pay the bill. The defendant offered no testimony, but prayed the court to instruct the jury that on the whole evidence, if believed by them, the plaintiffs were not entitled to recover. But the court refused so to instruct the jury and thereupon charged them that if they believed from the evidence that the defendant purchased from the plaintiffs the carriage as charged in the declaration, and that she stated at the time of the purchase that she was living in the country and wanted the carriage to ride backwards and forwards to look after her property in the city, and that she owned a house in the city then the plaintiffs were entitled to recover. Verdict for plaintiffs.

THOS. F. MILLER and JOHN F. RILEY for plaintiffs.

HAGNER & MADDUX for the defendant cited the case of *Schneider & Son vs. Garland* decided at the last term of the court and reported *ante*, p. 350.

Chief Justice CARTTER, delivering the opinion of the court, said :

The rule laid down in the case of *Schneider & Son vs. Garland*, decided at the last term of this court must be held to apply here. That was even a much stronger case than this but the court found that the defendant, a married woman, was not liable in an action at law. This rule being applied it follows that the judgment below must be reversed.

THE UNITED STATES vs. CHARLES J. GUILTEAU.

CRIMINAL DOCKET. No. 14,056.

{ Decided May 22, 1882.
 { The CHIEF JUSTICE and JUSTICES MAC ARTHUR, HAGNER and
 { JAMES, sitting.

1. Section 5339 of the Revised Statutes of the United States applies to murder committed within the District of Columbia.
2. Murder is committed within the District of Columbia when the felonious blow is struck there, notwithstanding the consequent death happen without the District and in one of the States.
3. Penal statutes are to be construed like all other statutes, according to their plain and sensible meaning, and a plain and sensible purpose is not to be defeated by an arbitrary method of reading its words. The words are to be so construed as to effectuate the intention of complete protection against the crime, if their ordinary and reasonable meaning permit such construction.
4. Insanity is a defence on the very ground that it disables the accused from knowing that his act is wrong. The very essence of the inquiry is whether his insanity is such as to deprive him of that knowledge. If, therefore, a witness is competent to give his opinion as to the mental capacity of the accused, he is competent to state his opinion as to the degree of capacity or of incapacity, by reason of disorder, and whether the disorder seemed to have reached such a degree as to deprive him of the knowledge of right and wrong.
5. The question whether a certain trait in the defendant's character is an indicium of insanity involves the question of its nature, and an expert witness on the subject of insanity does not exceed the limits of the inquiry in stating precisely whether the trait be a vice or a disease.
6. Testimony by the defendant's wife (in the case at bar a divorced wife) that she saw no indications of insanity exhibited by him during their association, does not come within the rule which protects the privacy and confidence of the marriage relation.
7. Where, for the purpose of proving the insanity of the defendant, evidence is given searching the history of his whole life down to the time of the act charged in the indictment, and his moral nature and traits are presented to the jury as showing that acts done by him must be accounted for by a conclusion of insanity, testimony is admissible in rebuttal as to particular acts and conduct of the defendant contemporaneous with the history produced on his part and tending to disprove the existence of the grounds on which the inference of insanity is based.
8. Whether the inability to resist wrong by one having an actual knowledge of the difference between right and wrong, is such a mental disorder as would constitute a defence to the crime of murder, *quære*.
9. It is not error to refuse to instruct the jury upon a matter of law where no evidence tending to raise that question is introduced.
10. Nor is it error, where no evidence is introduced tending to show an incapacity to act upon a knowledge that the act was wrong, for the court to instruct the jury that the affirmative tendency of the evidence in the case was to support a wholly different theory and ground of defence.
11. The first day of a term of this court, but not its duration, is fixed ;

the term ends whenever the court adjourns *sine die*, and is then determined for all purposes. If, therefore, the day to which final execution of a sentence is postponed falls after the next term of this court as determined by its adjournment *sine die*, execution is postponed in accordance with the meaning of Section 845 of the Revised Statutes of the District of Columbia.

12. If it should happen in any case that this court has prolonged the "next term" referred to in that section until the day set for final execution is reached, the criminal court would then be authorized upon application of the party, to postpone execution, so that it should fall after the actual adjournment *sine die* of this court.

STATEMENT OF THE CASE.

On the 2d of July, 1881, the President of the United States, James A. Garfield, while standing in the waiting room of the Baltimore and Potomac Railroad depot, in the city of Washington, D. C., was fatally shot by the prisoner, Charles J. Guiteau. The ball from the assassin's pistol entered the back of the President about three inches to the right of the back-bone and inflicted a wound which resulted in death about three months afterwards at Elberon in the county of Monmouth in the State of New Jersey. Immediately after the death the body was brought back to the District of Columbia and laid in state at the Capitol. No inquest was held upon the body while in the District. These facts are shown on the record to be undisputed. For this crime the prisoner was arrested, indicted, tried, convicted and sentenced at a criminal term of this court. The indictment contained eleven counts, in each of which a place of death was stated. Some laying it in the District of Columbia without any *videlicet*, and others alleging it as occurring in Monmouth county, State of New Jersey; others that the death took place in Monmouth county, State of New Jersey, and that the body was afterwards brought within the District of Columbia.

The trial lasted from the 14th of November, 1881, until January 25th, 1882, when a verdict of guilty as indicted was rendered. Whereupon the prisoner, on the 4th day of February, 1882, was sentenced to be executed on the 30th of June following:

Numerous exceptions were taken at the trial and embodied in thirty-two bills of exceptions brought to the General Term.

Most of them, however, were either abandoned or not pressed upon the argument of the case. The counsel for the prisoner resting mainly upon the want of jurisdiction, the admission of certain testimony and the invalidity of the sentence. The following extracts from the brief and argument of counsel for the prisoner bear only upon the more important points raised.

CHARLES H. REED, for the prisoner :

I. Had the criminal court jurisdiction to try and sentence the prisoner for the crime of murder? I insist that it did not have such jurisdiction.

The evidence is undisputed that the death occurred in Monmouth county, New Jersey. The common law prevails and is in force in the District of Columbia, in reference to the place where the crime was committed unless the same has been modified by statute. This has not been done. By the common law, where the mortal wound was inflicted in one county or jurisdiction and the death occurred in another county or jurisdiction, the accused could not be convicted in either of murder for the reason that the crime of murder was not complete till the death happened, and the mortal wound and death must occur in the same jurisdiction. This is technical, but it is the law. Each State is independent of and foreign to the United States, and every other State, so far as the definition and punishment of crimes are concerned. In this respect the State of New Jersey is just as independent of and foreign to the United States and District of Columbia as it is to Canada. Story on Conflict of Laws, 4th ed., secs. 620, 621 ; 4 Gilman (Ills.) 525 ; 74 Ills., 218.

It is the law beyond any question that where the mortal wound is given in one country and the victim dies in another country, the person inflicting the wound cannot be tried in either for murder unless there is some statute to authorize it. In the year 1548 the Parliament of Great Britain passed a law to change the common law and to provide for the indictment and trial of cases where the mortal wound was given in one county and death occurred in

another. The preamble to said law expressly states that prior to the same no sufficient indictment could be found in either county. Thus the law-making power of Great Britain explicitly declared what the common law then was in such a case. See the Stat. of 2d and 3d Edw. VI., chap. XXIV. The preamble of which is as follows :

“Forasmuch as the most necessary office and duty of the law is to preserve and save the life of man, and condignly to punish such persons that unlawfully and wilfully *murder*, flay, and destroy man. * * * II. And where it often happeneth and cometh in ure in sundry counties of this realm that a man is feloniously stricken in one county, and after dieth in another county, in which case it hath not been founden by the laws or customs of this realm that any sufficient indictment thereof can be taken in any of the said two counties, for that *by the custom of this realm the jurors of the county where such party died of such stroke can take no knowledge of the said stroke being in a foreign county*, although the same two counties and places adjoin very nearly together ; *we the jurors of the county where the stroke was given cannot take knowledge of the death in another county*, although such death most apparently came of the same stroke ; so that the King’s majesty within his own realm cannot, by any laws yet made or known, punish such *murderers* or manquellers for offenses in this form committed and done, * * * for redress and punishment of which offenses, and safeguard of life, be it enacted,” &c.

All recognized precedents of indictment for murder allege that the victim died within the jurisdiction of the court where the accused is indicted. Whartons’ Prec. of Indictments, Vol. 1, 8th ed., p. 114, note W.

In Vol. 1, 8th ed., Wharton’s Crim. Law, sec. 338, it is said :

“The indictment at common law should also aver that the deceased died in the county in which the indictment is found.”

In Chitty’s Criminal Law, Vol. 1. (5th Am. ed.), 177, the author says :

"The venue was always regarded as a matter of substance, and, therefore, at common law, when the offense was commenced in one county and consummated in another, the venue could be laid in neither, and the offender went altogether unpunished. * * * And thus, also, if a mortal blow was given in one county, and the party died in consequence of the blow in another, it was doubted whether the murder could be punished in either, for it was supposed that a jury of the first could not take notice of a death in the second, and a jury of the second could not inquire of the wounding in the first."

And to the same effect are Blackstone, Vol. 2, p. 302; Bacon's Abr., Vol. 5, p. 62; Hawkin's Pleas of the Crown, Vol. 2, p. 301, § 36; Hale's Pleas of the Crown, Vol. 2, p. 163; Comw. *vs.* Linton, (2 Virginia Cases, 205), decided in 1820; 1 Devx. (S. Ca.) Law Rep., 141, decided in 1826; State *vs.* Moore, 6 Foster, (N. H.), 451; 101 Mass. Rep., 1; 7 Mich., 160; 8 Mich., 334; 12 Wisc., 600; 31 N. J., 68; 40 N. J., 546; 1 Wash. C. C., 463. In 2 Curtis C. C., 451, the indictment charged that the mortal wound was given on the high seas, on board a vessel of the United States, and that the deceased afterwards died on shore within the United States. The prisoner was convicted of manslaughter. Afterwards his counsel moved in arrest of judgment. Curtis, J., said:

"The 12th section of the act of April 30, 1790, (1 Stat. at Large, 115), makes the crime of manslaughter on the high seas punishable by fine and imprisonment. It does not define the term otherwise than by the term of manslaughter. It thus remits us to the common law for its definition. Manslaughter is the unlawful killing of a human being without malice, and there is not such a killing on the high seas if the death takes place on land. In accordance with this, Judge Washington, in United States *vs.* McGill, (1 Wash. C. C., 463), decided in 1806, that the killing with malice by a stroke on the high seas that produced death on shore, was not murder on the high seas."

In 15 S. & M., 257, the mortal wound was inflicted in one

county and the death occurred in another, the Supreme Court of Mississippi in deciding the case, say :

“The better opinion seems to have been that by the common law, when the blow was given in one county and the death happened in another, the offender was not indictable in either.”

If this court follows the decisions heretofore made in the District of Columbia, then further argument is unnecessary, for the precise question has been twice decided, as appears from the two following cases :

In *United States vs. Bladen*, 1 Cr. C. C., 548, the mortal wound was given in the District of Columbia and the death occurred in the State of Maryland. The court says :

“The court, upon consideration of the point reserved, is of the opinion that as the death happened in St. Mary’s county in Maryland, although the fatal stroke was given here, the judgment must be for the prisoner, the offense not being complete within our jurisdiction. (*Haydon’s Case*, 4 Co., 41, (a); *Horne vs. Ogle*, 42 Co., 4, (b); 2 Just., 318–320 ; 3 Just., 48, 49, 73.) The prisoner being also indicted for an assault was bound over to appear to answer to that indictment, and in the meanwhile to be of good behavior.”

This same question was decided in the same way by Judge Crawford in the criminal court of the District of Columbia in the case of James Rolla, who was indicted for murder. The case is reported in 2 Am. L. Jour., 138. I admit that there are a few decisions which hold that when the stroke and death occur in different counties the indictment may be found in the county where the wound was inflicted. (1 East, 361 ; 1 Hale P. C., 436.) But both these authors say that in such case the body was removed to the county where the mortal wound was given *for the coroner to take an inquest. No inquest was held upon the body of the deceased in this case in the District of Columbia.*

Lord Hale, on the same page, says: “On the other side, as to some respects, the law regards the death as the consummation of the crime and not merely the stroke.”

East, in a note at the bottom of page 361, (1 East), says :

“That opinion, however, is contrary to the sense of the legislature as expressed in the Stat. 2 and 3 Edw. VI, ch. 24, which declares that in such case it hath not been found by the laws or customs of this realm that every such indictment thereof can be taken in either of the said two counties.”

This note clearly shows that Mr. East did not think the text good law.

In *Riley vs. State*, 9 Humphrey (Tenn.), 646, the Supreme Court decides that the crime was committed where the wound was inflicted. But it was not necessary to decide that question, for from the evidence, it might properly have been inferred that the victim died in the county where the wound was inflicted.

The Supreme Court of Wisconsin expressly dissent from the case above cited. *State vs. Pauley*, 12 Wisc., 541.

The *State vs. Brown*, 16 Webb (Kansas), 475, is a most remarkable decision. The information wholly failed to allege the place of death, and yet the court sustained a conviction for manslaughter, although the law is well settled that the indictment or information must allege the place of death. It does not appear from the report of the case where the deceased died. He may have died in the county where the mortal blow was given.

The foregoing are all cases where the wound was inflicted in one county and the death occurred in another county of the same State, and not in another State or foreign country.

The only case (which I have found) which holds that where the mortal wound is given in one State and the injured party dies in another State, the accused may be tried in the county where the wound is inflicted, is that of *Minnesota vs. Gessert*, 21 Minn., 369.

This case stands alone, and should not, I submit, be followed by this court against the authorities above cited to the contrary.

If there is a fair and reasonable doubt of the jurisdiction of the criminal court to try and sentence the defendant, then the court should give him the benefit of the doubt.

Wharton, Vol. 1, sec. 28, in his work on Criminal Law, says:

“At the same time, in matters of reasonable doubt, this doubt is to tell in favor of life and liberty.”

He refers in note 2 to *U. S. vs. Morris*, 14 Pet., 464 ; *U. S. vs. Wiltberger*, 5 Wheat., 76 ; *U. S. vs. Sheldon*, 2 Wheat., 119 ; *U. S. vs. Clayton*, 2 Dillon, 219. In the case of *McGill vs. U. S.*, 4 Dallas, 397, Judge Peters, on this question, says :

“It is a general rule with me to abstain from the exercise of jurisdiction whenever I doubt my authority to exercise it.” In *U. S. vs. Gardner*, 10 Pet., the court say :

“But if this is a doubtful construction of the act it ought to be adopted in a case so highly penal as the present.”

Twenty-six States have passed laws to change the common law on this question, thereby showing that the law-making power of such States considered such changes necessary. Congress has not passed any such law in reference to the District of Columbia. It is a *casus omissus*.

It has been suggested that the criminal court had jurisdiction by virtue of section 731 of the Revised Statutes of the United States, which reads thus :

“When any offense against the United States is begun in one judicial circuit and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district in the same manner as if it had been actually and wholly committed therein.”

The District of Columbia is not a judicial district or circuit. It is not so declared by any law. And Congress in section 3491 Revised Statutes regards and treats the Supreme Court of the District Columbia as not being embraced in the list of United States district courts. The defendant was indicted, tried, and sentenced in the criminal court of the District of Columbia. The criminal court is certainly not a United States district or circuit court. 7 Wall., 371. The crime for which the defendant was convicted was not begun in any *judicial, district or circuit court* of the United States recognized by law, and it was completed within the

jurisdiction of a State. If the deceased had died within the District of Columbia the offense would have been against the United States and not against any State. If the defendant had shot the deceased at Elberon, in the State of New Jersey, and he had died there, it would have been an offense against the State of New Jersey and not against the United States, and no United States court would have had any jurisdiction over it.

Suppose the defendant had shot the deceased at Elberon, in the State of New Jersey, instead of in the District of Columbia, and he had died there; would any United States court in New Jersey, in such case have jurisdiction to try him? Clearly not. Without some act of Congress the criminal court of the District of Columbia would not in such a case have jurisdiction to try him.

II. The most serious and grievous error perpetrated on the trial was the admission of the testimony of Mrs. Dunmire. She was married to the defendant in July, 1869, and lived with him until 1873, a period of four years, when she was divorced. She was put upon the stand and asked the following question :

“ You said that you were married to the defendant in 1869, and lived with him as his wife up until the time of your divorce in 1874. I will ask you to state to the jury whether in your association with him you ever saw anything that would indicate that he was a man of unsound mind?” Objection was made, but overruled, and the witness answered : “ I did not.”

I submit she was an incompetent witness. Section 877 Revised Statutes of the District of Columbia provides as follows :

“ SEC. 877. Nothing in the preceding section shall render any person who is charged with an offense in any criminal proceeding competent or compellable to give evidence for or against himself ;

“ Or render any person compellable to answer any question tending to criminate himself ;

“Or render a husband competent or compellable to give evidence for or against his wife, or a wife competent or compellable to give evidence for or against her husband, in any criminal proceeding or in any proceeding instituted in consequence of adultery ;

“Nor shall a husband be compellable to disclose any communication made to him by his wife during the marriage, nor shall a wife be compellable to disclose any communication made to her by her husband during the marriage.”

Does this divorce relieve the objection of this statute? By no means. She did not attempt to testify to anything that occurred except during the marriage relation. Nothing before, nothing after. I refer your honors to 1st Greenleaf's Evidence, sections 334 to 338 inclusive. In section 337 he says :

“Neither is it material that this relation *no longer exists*. The great object of the rule is to secure domestic happiness by placing the protecting seal of the law upon all confidential communications between husband and wife ; and whatever has come to the knowledge of either by means of the hallowed confidence which that relationship inspires cannot be afterwards divulged in testimony, even though the other party be no longer living.”

And see 13 Peters, 209, and cases cited. Cross vs. Rutledge, 81 Ill., 268. Waddams vs. Humphrey, 22 Ill., 661 ; Creed vs. The People, 81 Ill., 565 ; 58 Ill., 366.

III. The sentence is void. Section 845 of the Revised Statutes of the District of Columbia is as follows :

“To enable any person convicted by the judgment of the court to apply for a writ of error in all cases where the judgment shall be death or confinement in the penitentiary, the court shall, on application of the party accused, postpone the final execution thereof to a reasonable time beyond the next term of the court, not exceeding in any case thirty days after the end of such term.”

The defendant was sentenced on the 4th day of February, 1882, which day was in and during the December Term, 1881,

of the criminal court. The next term of the General Term the Supreme Court, after the sentence, begun on the fourth Monday of April, 1882, and will continue until the fourth Monday of October, 1882.

The defendant was sentenced to be executed on the 30th day of June, 1882. The date of his execution should by law have been fixed on some day within thirty days after the fourth Monday of October, 1882. It needs no authority to show that the judgment of a court of sentence to death is null and void if the day fixed for the execution of the sentence is not authorized by law. In this case the day fixed for the execution of the defendant is not only not authorized by law, but is expressly prohibited. The language is: "*The court shall,*" &c. The words "*to a reasonable time beyond the next term of the court,*" most evidently mean and refer to the next General Term of the Supreme Court, and not to the next term of the criminal court. The manifest object of the statute was to give the accused ample time to have his case heard by the judges of the General Term of the Supreme Court. This is clear from its language:

"To enable any person convicted by the judgment of the court to apply for a writ of error," &c.

Such writ of error can be heard only in and by the General Term of the court. Where terms of court are fixed by law, each term continues from the day the court convenes to the day designated by law for the commencement of the next succeeding term. The period from the fourth Monday of April, 1882, to the fourth Monday of October, 1882, constitutes the April term, whether or not the judges thereof hold the court every day during that time.

GEORGE B. CORKHILL for the United States:

As to the jurisdiction. The definition of murder as contained in the works of standard ancient and modern writers upon English and American criminal law will be useful.

Finch defines murder to be "manslaughter upon former malice, which we call premeditated malice; as if one to kill hi

wife give her (lying sicke) poyson in a rosted apple ; and she, eating a little of it, give the rest to a little child of theirs, which the husband, lest he be suspected, suffereth the child to eate, who dieth of the same poyson ; this is murder though the wife recover," &c. (Third Book of the Law, 215.)

According to Lord Coke, Pleas of the Crown, 47, "murder is when a man of sound memory and age of discretion, unlawfully killeth *within any county of the realm*, any reasonable creature *in rerum naturæ* under the King's peace with malice fore thought, either expressed by the party or implied by law, so that the party wounded or hurt, &c., die of the wound or hurt, &c., within a year and day of the same."

✓ Sir Mathew Hall, 1 Pleas of the Crown, 425-6, defines murder as "a killing of a man *ex malitia præcogitata*," and says that "antiently a barbarous assault with intent to murder so that the party was left for dead, but yet recovered again, was adjudged murder and petit treason."

Sir William Hawkins, whose work on Pleas of the Crown followed Hale's, after saying that the word "murder" anciently signified only the private killing of a man, and referring to 14 Edw. III, c. 4, repealing the Danish law concerning *Engleschire*, says :

"By murder, therefore, at this day, we understand the wilful killing of any subject whatsoever through malice forethought whether the person slain be an Englishman or a foreigner." (P. 92.)

East's Pleas of the Crown, appeared in the year 1716; and murder in the sense in which it was understood in the writer's time was defined to be "the voluntary killing any person (which extends not to infants in *ventre sa mere*) under the King's peace, of malice prepense or aforethought, either express or implied by law." (Phila. ed. of 1806, p. 214.)

Sir William Blackstone wrote in 1753, and in a note by the American editors to the first American edition of Hale's P. C., it is observed that Coke's definition of murder, as modified by Blackstone, is "so accurate, comprehensive and elegant that it has been universally recognized wherever
1c English law prevails. "Murder," says Blackstone, 4 Com.,

198, "is when a person of sound memory and discretion unlawfully killeth any reasonable creature in being and under the King's peace with malice aforethought either express or implied." This is substantially the definition of the crime as known for several hundred years and as now understood in the United States. (See Wharton Crim. Law, Vol. 2, sec. 930.)

It will be observed that the definition of Coke is the only one which in terms makes the "*killing within any county of the realm*" an essential constituent element of the offense of murder. On page 48 he speaks of "murder" being done out of the realm, as when two of the King's subjects go abroad and fight there and one kills the other, also of the murder involved in a stroke upon the high seas and the death upon land, &c., from which the inference seems fair that by the language quoted he did not mean that the stroke and death should necessarily be coincident in the same county, but if he did, from numerous decisions of the English and American courts, and various acts of Parliament and of legislatures in this country, it is manifest that the offense was not understood in England and has not been understood in this country in that restricted sense.

East (1 Pleas of the Crown, 361) says :

"Where the stroke and death are in different counties, it was doubtful at common law whether the offender could be indicted at all, the offence not being complete in either, though the common opinion was that he might be indicted where the stroke was given, for that alone is the act of the party, and the death is but the consequence, and might be found, though in another county, and the body was removed into the county where the stroke was given." And see Finch, "Fourthe Book of Law," 411; Hale P. C., 462; Hawkins's P. C., 92, sec. 13.

East then says that, by the 2d and 3d Edw. VI, ch. 24, the trial is now settled to be in the county where the death happens.

That act provided for the indictment and trial in the county where the death happened, in cases wherein the

blow was inflicted in one county and the death happened in another. Afterwards, in the year 1729, Parliament passed the act known as 2d Geo. II, ch. 21. The act is entitled "An act for the trial of *murders*, in cases where either the stroke or death only happens within that part of Great Britain, called England." It provided as follows :

"For preventing any failure of justice, and taking away all doubts touching the trial of *murders* in the cases hereinafter mentioned, be it enacted, &c., * * * when any person, at any time after the 24th day of June, 1729, shall be feloniously stricken or poisoned upon the sea, or at any place out of that part of the kingdom of Great Britain called England, and shall die of the stroke or poisoning within that part of the kingdom of Great Britain called England ; or where any person, at any time after the 24th day of June, 1729, shall be feloniously stricken or poisoned at any place within that part of Great Britain called England, and shall die of the same stroke or poisoning upon the sea, or at any place without that part of the kingdom of Great Britain called England ; in either of the said cases, an indictment thereof found by the jurors of the county in that part of the kingdom of Great Britain called England, in which such death, stroke, or poisoning shall happen respectively, as aforesaid, whether it shall be found before the coroner upon view of such dead body, or before the justices of the peace or other justices or commissioners, who shall have authority to inquire of murders, shall be as good and effectual in the law, as well against the principals in any such murder, as the accessories thereunto, as if such felonious stroke and death thereby ensuing, or poisoning and death thereby ensuing, and the offense of such accessories had happened in the same county where such indictment shall be found ; and the justices of gaol delivery, &c., in the same county where such indictment should be found, &c., shall and may proceed, &c., as well against the principals in any such murder as the accessories thereto, &c., and they [the offenders] shall receive the like trial, judgment, order and execution, &c., as they ought to do, if such felonious stroke

and death thereby ensuing, or poisoning and death thereby ensuing, &c., had happened in the same county where such indictment shall be found."

Was the Colony or the State of Maryland entitled to the benefit of these statutes of 2d and 3d Edw. VI, ch. 24, and of 2d Geo. II, ch. 21, as a part of its law at the time of the Revolution.

The colonists brought with them so much of the common law and so much of the British statutes as was applicable to their new situation, and the colonial courts, as the exigency arose, applied both, and so far as the statutes were concerned they were applied without reference to the question whether they were of a general nature, or restricted by their terms to particular parts of Great Britain. But the courts of Maryland went even further than this, and enforced without regard to their general or local nature, such of the English statutes as were passed subsequent to the first emigration, when found applicable, in the *administration of justice*. This was the sole test. An instance is the statute of 11 Geo. II, ch. 19, which by its terms was restricted to "*that part of Great Britain called England, Dominion of Wales, and the town of Berwick-on-Tweed*." This statute was held to be in force in Maryland in *Calvert's Lessees vs. Eden*, 2 H. & McH., 290, and also in cases reported in 7 H. & J., 370, 372 ; 5 Gill, 12 ; and 30 Md., 294.

The act of 4 Geo. II, ch. 26, related to proceedings in the courts of justice "in that part of Great Britain called England" and to the "court of exchequer in Scotland," that of 6 Geo. II, ch. 14, related expressly to the court of assize "in the county Palatine of Chester ;" both have been held to be in force in Maryland and the instances might be multiplied. See Alexander's British Statutes, pp. 483, 497, 581, 594, 683, 645, 683.

Samuel Chase, a distinguished Maryland jurist and statesman, for many years prior to the Revolution one of the foremost lawyers at the bar of the colony, and afterwards one of the Associate Justices of the Supreme Court of the United States from 1796 until his death in 1811, in a letter evidently

written after the Revolution, referring to this subject, says : "It is a *general* principle that the first settlers of Maryland brought with them all English statutes made *before* the charter and in force at the time which were applicable to the *local and other circumstances* of the province, and the courts of justice always decided the applicability of any statute and of consequence its extension. I have understood that the judges of the *old* government laid it down as a general rule that all statutes *for the administration of justice*, whether made *before* or *since* the charter, as far as they were applicable, should be adopted by them." (Quoted in introduction to Kilty's Report on Statutes.)

The language of this letter became the language of the court in deciding the case of *Silby vs. William's Exrs.*, 3 G. & J., 52. In this case the court held that the statute of 30 Chas. II, chap. 7, and a part of 4 and 5 of W. & M., ch. 24, were in force.

Hence it follows that at the time of the Revolution the law of Maryland consisted of the common law and of all British statutes necessary "*for the administration of justice*" whether found before the charter or during the subsequent period of its subjection to the Crown of England, and this proposition it is submitted, is not affected by the bill of rights. That the statutes of 2 and 3 Edw. V, ch. 24, and 2 Geo. II, ch. 21, which provided for the trial of an existing offense, were necessary "*for the administration of justice*" is too plain to need argument.

From the Revolution to the time of the cession no change has been made in the law of the State, except by the act of 1789, ch. 22, which, however, does not affect the particular point now under discussion. See Kilty's Reports, 165.

The act of cession on the part of the State (1791, ch. 45,) provided that the laws of the State were not to cease in the ceded territory until Congress should otherwise ordain, and the act of Congress, February 27, 1801, provided that the laws of the State of Maryland, as they then existed, should be and continue in force in that part of the said District

which was ceded by the State to the United States and by them accepted.

The Government contends that on other grounds the jurisdiction of the court is ample ; but granting, for the sake of the argument, that this is not the case, it appears from the foregoing that under the law of Maryland as it existed at the time of the cession, the jurisdiction is complete ; that what the courts of the colony could have done at the time of the Revolution "*for the administration of justice,*" in the way of giving effect to acts of Parliament this court can do.

Neither the case of the United States *vs.* Bladen, 1 Cr. C. C., 548, nor the case of the United States *vs.* Rolla, reported in 2 Am. Law Journal, 138, can be regarded as conclusive precedents in the present case.

In the Bladen case the mortal blow was given in Alexandria (then a part of the District of Columbia), the death took place in St. Mary's county, Maryland, and the court was of opinion that the offense was not complete in the District of Columbia ; the act of Congress relating to the cession provided that in the part of the District of Columbia ceded by the State of Virginia, the laws of that State in force at the time should continue in force until altered or repealed by Congress ; so far as the trial was concerned, therefore, the law of Virginia was the law of the case, and it does not appear that the statute of 2 and 8 Edw. VI, ch. 24, or 2 Geo. II, ch. 21, was in force in that State. *Com. vs. Linton*, 2 Va. Cases, 205. The Bladen case, therefore, is of no authority in determining the law of Maryland, by which the point now under consideration must be determined.

There is no official report of the Rolla case ; the account in the Law Journal is but a memorandum prepared probably by the counsel for the prisoner. It gives what can be considered at most but the ruling upon the points raised of an inferior court, and whatever may be our respect for Judge Crawford, it cannot be maintained that his dictum in the case must be regarded as conclusive authority. Judicial opinions are entitled to no more weight than the force of their reasoning and the legal learning displayed in support

of them. The decision in the Rolla case is utterly destitute of either, and in the Bladen case there is none of the one and little of the other to recommend it.

But a broader view may be taken of the question. In early times the jury were in fact the witnesses ; in the case of a crime secretly committed, where there were no witnesses, there could be no jury trial. Profatt on Jury Trial, secs. 20, 29. Gradually they were allowed to hear evidence and use their own knowledge in connection with it, and in the beginning of the Tudor period in English history (1482) the same author says the jury in its present form may be considered as having been established.

Bishop, Crim. Law, secs. 113, 114, 115, and notes, learnedly discusses whether at common law the homicide is committed in the locality where the blow is given, or in that in which the death took place, or partly in one or partly in the other, and he arrives at the conclusion " that the infliction of the mortal blow constitutes the crime in felonious homicide, yet until death the mortality of the wound cannot be established in evidence. * * * * * True the United States courts have held that if a blow be given on the high seas, and death follows on land, this is not a homicide fully committed on the high seas. (See U. S. vs. McGill, 4 Dall., 426 ; U. S. vs. Bladen, 1 Cr. C. C., 548.) But this holding is mainly in consequence of the early cases not having been well argued, *and is a remnant of the old doctrine*, which necessarily prevailed when the petit jurors were also the witnesses. In addition to the American cases cited by Bishop in section 113, may be added the recent case of *Green vs. The State*, decided in the December term, 1880, of the Supreme Court of Alabama, in which it was held that " the crime of murder consists in the infliction of the fatal wound, coupled with the requisite contemporaneous intent or design which renders it felonious ; the subsequent death of the injured party is a result or sequence rather than a constituent elemental part of the crime." This, so far as the question of jurisdiction was concerned, was held to be a correct principle. In this case the shooting took place in Alabama, but

the death occurred within a year and a day in the State of Georgia. It is true that there was a statute covering the offence, which the court held to be valid, but the ruling was irrespective of it. Law-Central, No. 2, p. 90. And also in State vs. Gessert, 21 Minn., 369, in which a blow in the State followed by death in another State was held to be murder in the county where the blow was given.

Upon the question of the jurisdiction to try the defendant under the count in the indictment alleging the mortal blow in the District of Columbia, the death in Monmouth county, New Jersey, and that the corpse was brought back to the District in which the mortal blow was struck :

Finch's "Fourth Booke of Law," p. 411, after stating that an "enditement" that "one stroke I. S. in one county of which he died in another is no good enditement," proceeds "and, therefore, before the statute of 2 and 3 E. VI. (which altereth the law in the case) *they were wont to carry the corpse into the countie where the stroke was.*"

And Hale, p. 426, says : "If the party died in another county, the body was removed into the county where the stroke was given for the coroner to take an inquest *super visum corporis, &c.*"

Hawkins, page 94, sec. 13, says :

"But it hath been holden by others that if the corpse were carried into the county where the stroke was given, the whole might be inquired of by a jury of the same county."

East, page 361, says, that where the stroke and death were in different counties, it was doubtful at common law, whether the offender could be indicted at all, "though the more common opinion was that he might be indicted, where the stroke was given, for that alone is the act of the party, and the death is but a consequence, and might be found though in another county, *and the body was removed into the county where the stroke was given.*"

A note to the above in the Philadelphia edition of 1806, says that the statement of East, as to the common opinion respecting the trial in the county where the blow was struck,

&c., and the body being brought back, is contrary to the sense of the legislature as expressed in the statute of 2 and 3 Edw. VI, ch. 24, which declares that "in such case it hath not been found that by the laws or customs of this realm that any indictment thereof can be taken in either of said two counties." It does not seem, however, that the act refers to or includes a case in which the body was brought back, it simply deals generally with the case of a blow in one county and the death in another, in most of which it was doubtless not feasible to bring the body back, and such construction it should receive when relied upon as abolishing a common law proceeding, which, according to Finch, clearly obtained.

In the note to the sections of Bishop, above referred to, he quotes Starkie (1 Crim. Pl., 2d ed., 3, and note), upon the question of bringing the body back, as follows :

"And the difficulty was frequently avoided by carrying the dead body back into the county where the blow was struck, and there a jury might inquire both of the stroke and death." And he adds, "Where witnesses to the stroke who were to be the jurors might identify the body and thus learn of their own knowledge that the man was dead ;" and Bishop further says, "I have never seen it disputed, while it is often asserted, that whatever might be the legal rule in the absence of the dead body, if the body were brought back to the county where the blow was given, there might, before the statute of 2 and 3 Edw. VI, be an indictment in such county."

This statute, even if the common law had been as stated in it, which is doubtful, did not, as we have seen, apply to a case where the body was brought back.

Under the counts in the indictment, alleging the mortal blow in one judicial district and the death in another :

Section 731 Revised Statutes of the United States, edition of 1875, reads as follows :

"When any offence against the United States is begun in one judicial district and completed in another, it shall be

deemed to have been committed in either, and may be dealt with, inquired of, tried, determined and punished in either district in the same manner as if it had been actually and wholly committed therein."

Was it the intention of Congress that the District of Columbia should be considered a judicial district in the sense in which the term is used in this section.

Sections 760, 761 and 762 of the Revised Statutes relating to the District of Columbia demonstrate this beyond question.

"SEC. 760. The Supreme Court *shall possess the same powers and exercise the same jurisdiction* as the circuit courts of the United States.

"SEC. 761. The justices of the Supreme Court shall severally *possess the powers and exercise the jurisdiction* possessed and exercised by the judges of circuit courts.

"SEC. 762. Any one of the justices may hold a special term with *the same powers and jurisdiction* possessed and exercised by district courts of the United States."

The word "circuit," used in section 731 in place of "district," in the revision of 1878, is an evident error ; no amendment of the section as it appeared in the first revision had been made, and the commission had no authority to change the word ; the second revision is not conclusive and the section must stand as in the edition of 1875. See act of March 2, 1877, ch. 82, as amended by the act of March 9, 1878, ch. 26, providing for appointment of commissioner to prepare new edition, &c. 19 Stats., 268 ; 20, 27.

In regard to the testimony of Mrs. Dunmire :

While a wife may not testify as to what was communicated to her by her husband she is not prevented from testifying as to facts learned by her own observation and open to observation of other parties, although they concern her husband. Greenleaf, Vol. 1, sec. 254, in laying down the general rule, says : "*She may be permitted to testify to facts which came to her knowledge by means equally accessible to any person not standing in that relation.*"

The cases of *Anderson vs. Kennaird*, 6 East, 188 ; *Bever*

idge vs. Winder, 1 Car. & P., 369 ; Coffin vs. Jones, 15 Pick., 445, and Williams v. Baldwin, 8 Vt., sustain this doctrine. Mrs. Dunmire was not offered to prove a confidential communication of Guiteau to her while his wife. She was simply giving her opinion founded on her own observation of him. Her testimony is purely negative, *i. e.*, that she never *observed* anything indicating insanity. It seems impossible to regard this as a disclosure of confidential communications.

WALTER D. DAVIDGE, special attorney for the United States, from whose argument on the question of jurisdiction we extract the following :

This indictment is under the act of Congress of 30th of April, 1790, commonly known as the crimes act.

The objection to the jurisdiction of this court involves, in my humble judgment, two patent fallacies ; first, that the plain and obvious meaning of the words of a statute of the United States is to be controlled by the common law ; and, secondly, that there is any such doctrine known to the common law as that the place of death is a constituent element in the crime of murder.

The counsel for the defendant is certainly right when he says that there can be no crime against the Federal Government, save where it is created by statute, and he might have added, for the simple reason that the Federal Government had no antecedent law whereby crime was to exist, and having no antecedent law, of course it had not any common law.

Among the provisions of the crimes act, which undoubtedly was intended to embrace the whole area of crime against the Government, is the following :

“ SEC. 3. *And be it enacted, &c.* That if any person or persons shall within any fort, arsenal, dock-yard, magazine, or in any other place or district of country, under the sole and exclusive jurisdiction of the United States, commit the crime of wilful murder, such person or persons on being thereof convicted, shall suffer death.” (1 Stat., 113.)

That statute was passed eleven years before the acquisition of the District of Columbia, and was in anticipation of the acquisition, as well of the District of Columbia, as of other needful places, all of which places when from time to time ceded, came under the operation of the act.

This is a very plain statute. It says, so plainly that he who runs may read, that if any person shall, within any place subject to the exclusive jurisdiction of the Federal Government, commit the crime of murder, such person should suffer death.

What is meant by committing the crime of murder? The great fundamental rule to be applied to the construction of this and all other statutes, is that the words of the legislature are to be taken in their plain and ordinary and popular sense.

It is charged in the indictment, and found by the jury, that the defendant struck the mortal blow here, wherever the victim died. Does anybody deny that the offense intended to be punished by the above law is the act? It is the *commission*—the law says, in plain terms, that if any person in said district shall *commit*. Let me call attention to the places in relation to which the legislature was enacting this law. They were not places where communities were expected to congregate. The largest of all these embraced in the law is the District of Columbia. A dock-yard does not afford accommodations for people who are stricken by mortal blows. Neither does an arsenal, nor a post-office, nor a custom-house, nor a court-house. And yet if I am wrong, in respect of what Congress meant by the use of this word *commit*, the legislature intended that a President of the United States could be struck mortally in any one of the places mentioned, and it would not be murder unless he died within such places.

We have heard of the statute of 2d and 3d Edward VI, whereby, when the mortal stroke was in one county of England and death in another, the jury of the county where the victim died could try the offense; and also of 2d Geo. II, providing for cases where either the stroke or death hap-

pened within that part of Great Britain called England. But the difficulty in the United States is that legislation could not in many cases provide a remedy. 'The sixth amendment to the Constitution provides—

“In all criminal prosecutions the accused shall enjoy the right to a speedy trial by an impartial jury of the State and district *wherein the crime shall have been committed.*”

Well, if murder cannot be committed unless the victim dies within the judicial district where the mortal blow is struck, it is absolutely impossible for Congress to apply a remedy in any case where the blow is struck in one jurisdiction and the victim dies in another. For by the organic law the party charged is entitled to a trial in the State or district where the crime is committed.

Do you believe that the legislature intended to perpetrate the huge farce of undertaking to punish crimes committed in these places by a provision that would be *brutem fulmen* if the party left that place and passed into the jurisdiction of a State? Or do you believe that in cases where the party stricken passed from the place under the exclusive jurisdiction of the Federal Government, and died, it was intended that the crime committed should not be that of murder?

But it is said that the common law imposes upon this law the condition provided the party struck shall die within the county.

My answer is, what has the Congress of the United States to do with the common law? I concede that in this section of the crimes act, the words “the crime of murder” being used we all turn to the jurisprudence of the mother country to find out the meaning of those words. But I am at an utter loss to conceive how, when the Congress of the United States has passed a law, the plain meaning of that law can be controlled or overridden by considerations which belong to the territorial division of the mother country, or the machinery by which the crime of murder was punished there, or the incidents to or consequences of such crime there, or the policy of that country, or indeed anything else but the meaning of the word murder. For that I admit we

turn to the law of England as understood when the act was passed ; but what part of that law ? If a technical term is used in an act of Congress, that of murder as here, for instance, are we to turn for guidance to what the judicial and legal mind of the mother country recognized and reprobated as murder, or are we to be remitted to the twilight and barbarism of the common law ?

There is no writer upon English law who defines the crime of murder as involving, as a constituent element, the death of the victim in the jurisdiction where the blow was struck.

The whole difficulty lay in the circumscribed powers of an English grand jury, which did not allow that body, where death took place beyond the county, to find the fact of death, which fact you will observe, but not the place where it happened, was an inherent essential element in the crime of murder. 4th Blk. Com., 195 ; Coke P. C., 47 ; Hale P. C., 425, 426 ; Hawkins P. C., 92 ; East. Crown Law, 214, § 2 ; King *vs.* Hargrave, 5 C. & P., 510 ; Grosvener *vs.* Inhabitants of Lath, 12 East, 344. These authorities abundantly show that according to the definitions of murder nowhere is the place of death an element of the case.

In the Constitution of our country it is a very common thing to use terms which require definition or explanation by reference to English jurisprudence. Thus the Constitution speaks of a bankrupt system. It speaks also of maritime and admiralty jurisdiction. What is the meaning of these terms ? How far back are we to go to get a meaning ? If, in respect of bankruptcy, we went back to the twilight we would not get any meaning at all, for there was no bankruptcy system. The whole system in England is statutory, so far as I know. So, if, in respect of admiralty or maritime jurisdiction, we went back to the beginning, we would inevitably strike upon the rock of barbarism. What, therefore, is the correct rule when either the Constitution or a statute uses a technical term ? Surely, it is the accepted and recognized meaning of that word at the time of such use, whether such meaning be the result of the original principles of the common law or of statutory enactments, and

the rule of reference is even then not a very stringent one. Reference is not made to a rule to control and override the legislative intent, but only to something which may afford light in the ascertainment of such intent. If, without such reference, the intent is clear, then the courts must execute the intent, although varying from, or, even in direct conflict with, any principle or rule of English jurisprudence, See *Waring vs. Clark*, 5 How., 441, 456, 457, 458.

Now, let us suppose a place under the exclusive jurisdiction of the Federal Government, and a party mortally stricken in such place, and then taken for health, or what not, into a judicial district beyond that in which the place is situated, then you have not only the evil that is presented here of a failure of justice, but you have such failure incurable under the Constitution of your country, if "committed" means what it is contended on the other side to mean. It would not be competent even for Congress to afford any remedy whatever. But to the end of time, or until an amendment of the Constitution, the crime of murder is to stalk unpunished, simply because whilst the evil energy of the criminal was exerted to its utmost in one judicial district of the United States the death of the party stricken ensued in another judicial district.

The thing punished, then, by the law is the act—where a person "commits." There is no room for doubt. The underlying fallacy in respect of this whole subject of jurisdiction consists simply in not discriminating between the crime and the processes whereby in ancient times the crime was punished.

If you will refer to 4th Blackstone Commentaries, 195, &c., it will be found that the writer there treats at large of the crime of murder, but does not allude, however remotely, to the death of the stricken man beyond the county or the realm. It is afterwards, and when treating of the processes whereby the crime was punished, that he points out the limited powers of an English jury and the remedies applied by Parliament in the acts of 2 and 3 Edward VI. and 2 George II.

The same may be said of the arrangement adopted by that accurate writer, Mr. East. He defines murder, Vol. 1, at section 112, and devotes many pages to the consideration of the crime. Subsequently, commencing at section 126, Vol. 1, he examines the processes of punishment; or in his own language, "where this offense may be examined into and tried"; and then, for the first time, explains the insufficiency of the power of a grand jury, in consequence of its inquiry being confined to the county, and the remedy enacted to supply such insufficiency.

I ought to state in this connection that, although where the victim died beyond the county of the stroke, the offender could not, at common law, be punished by indictment, it is a great mistake to suppose that there was no other punishment for the offense. At that time in England there was a proceeding very common, that of appeal of murder, in which the wife, or near relative of the deceased party, could recover both compensation for the loss sustained, and at the same time a judgment as severe as if the offender had been indicted. That proceeding, involving both the vindication of private right and public justice, could be instituted in the county where the mortal blow was struck, although death ensued in another county.

East says :

"At common law the appellant had his election to bring his appeal in either county, in which case it was triable by a jury returned from each. Crown Law, sec. 128.

Thus, it is not true that when the deceased died in the county where stricken, murder ceased to be murder if he died in another county; on the contrary, it was murder everywhere.

On this subject of an appeal of murder I respectfully refer the court to 4 Bl. Com., 312-316; and the appeal of murder case in Maryland of *Soaper vs. Negro Town*, 1 H & Mc H., P.

Could there be a stronger illustration—that the defect of the common law consisted in the incapacity of the grand jury to inquire of the fact of death where it happened out of the county, and not in the monstrous notion that there was

no crime where death so happened—than in the passage cited from East.

But this is not all. Where the body of the deceased was carried back into the county where the blow was struck, the grand jury had full power to inquire and find the indictment. Why? The only reason why the indictment could not be found where the deceased died in another county, or died abroad, was that the vision of the grand jury was not by the English law allowed to penetrate beyond the limits of the county. They could not, therefore, inquire whether the deceased was dead or not, and death was a postulate of the crime of murder, not death in a particular place, but death; and inasmuch as death happened out of the county the grand jury, strange and as absurd as it may appear at the present day, could not inquire and ascertain that fact. But suppose the dead body was taken back into the county where the blow was inflicted. The fact of death was then a fact within the county unmistakably shown by the body. The man who was quick before was in the county dead; hence the grand jury had full power to inquire, and that too in the most ancient period of the common law. (Finch "Fourthe Book of Law," 411; Hale's P. C., 426; Hawkias' P. C., 92, s. 13; 1 East's Crown Law, s. 128.)

But, says the learned gentleman who opened this argument for the defense, "There was no coroner's inquest in this case." I never knew that a coroner's inquest was necessary to call into action the power of a grand jury. Besides, I am now discussing the meaning of the term murder as used in the English common law; and it is demonstrable that so far from the crime not being committed when the deceased died beyond the county where the blow was struck, it was as completely committed as if the deceased had died in that county; and in the most ancient days of the common law the carrying of the body to such county enabled a grand jury to find an indictment.

A very interesting case on this subject is the case of the King vs. Burdette, 4 B. & Ald., 436, where Chief Justice Abbott very fully treated of this subject of the circum-

scribed power of a jury to inquire beyond the county either in criminal or civil cases.

In further illustration of the proposition that the crime of murder was at common law complete where death ensued, wherever it ensued, you will see that neither of the statutes of 2d and 3d Edw. VI, and 2d Geo. II created a new felony, but merely provided a mode of punishment for a crime already existing.

As stated by East (1 Crown Law, sec. 130), "The statute of 2d and 3d Edward VI created no felony, but merely removed the difficulty which was supposed to exist in the trial of murder where the stroke was in one county and the death in another." So with respect to the statute of 2d Geo. II, it created no new felony, but simply enlarged the proceeding of punishment by indictment of offenses which upon the face of the statute itself are declared to be murders.

In concluding on this question of jurisdiction, if this court should not concur with the views here presented, I submit that the jurisdiction can be maintained upon the ground so ably and elaborately discussed by Judge Cox in his opinion; that is, that the statute of 2d Geo. II, was part and parcel of the laws of the State of Maryland, which were adopted and applied by Congress to the District of Columbia by the act of the 27th of February, 1801. It is not possible for me to add anything to the learning, research, and reasoning of that opinion, and it is not surprising that the learned counsel for the defense has not even attempted to controvert the views expressed and enforced by the learned judge.*

Mr. Justice JAMES delivered the opinion of the court :

The defendant, Charles J. Guiteau, was indicted, tried, convicted and sentenced at a criminal term of the Supreme Court of the District of Columbia, for the murder of James A. Garfield, and has now brought his case into the general term for review upon certain questions of law.

*See the opinion of Mr. Justice Cox in the appendix.

It appears by the record that the defendant shot the deceased on the 2d day of July, A. D. 1881, with a pistol, in the station of the Baltimore and Potomac railroad, in the city and county of Washington, in the District of Columbia, and that the deceased afterwards, on the 19th day of September, A. D. 1881, died at Elberon, in the county of Monmouth, in the State of New Jersey, of the mortal wound caused by that shooting; that the dead body of the deceased was afterwards brought from New Jersey into this city and county, and that no inquest thereon was held by the coroner or other officer in the District of Columbia. These facts are undisputed.

This indictment is founded on section 5339 of the Revised Statutes of the United States, which provides that—

“Every person who commits murder within any fort, arsenal, dock-yard, magazine or in any other place, or district of country under the exclusive jurisdiction of the United States * * * shall suffer death.”

As the argument on the part of the defendant questioned the application of this general statute to the District of Columbia, and as this question has not hitherto been formally presented on appeal, we propose now to re-examine it, notwithstanding indictments under this statute have always been sustained in the criminal court and sentence been affirmed here.

That part of section 5339 which has been cited was drawn, in the revision of the statutes, from the act of April 30, 1790, known as the first crimes act, which was passed in the second session of the first Congress, when the legislature was occupied in measures for putting the new government in operation. The third section of that act provided—

“That if any person or persons shall, within any fort, arsenal, dock-yard, magazine, or in any other place or district of country, under the sole and exclusive jurisdiction of the United States, commit the crime of wilful murder, such person or persons, on being thereof convicted, shall suffer death.”

The Constitution of the United States had provided that—

"The Congress shall have power * * * to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may by cession of particular States, and the acceptance of Congress become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." Art. I, section 8.

It will be observed that, in designating the places in which the commission of murder should be deemed a crime against the United States, the legislature employed substantially, and to some extent, precisely the language found in that clause of the Constitution which conferred upon it the power to exercise exclusive legislation over certain places. It was the duty of the legislature to provide at some time for the cases thus committed to its power by the Constitution, and it is to be gathered from this similarity of the language of the statutes and of the clause of the Constitution referred to, that the legislature intended to perform that duty at once, in organizing the machinery of the new government. Considered from this point of view the terms of the law indicate an intention to provide, so far as the crime of murder was concerned, not only for the forts, arsenals, magazines, and dock-yards mentioned in the Constitution, but for the particular district described in the same clause of that instrument. The designation of place was as strictly applicable to the district, as to the forts and magazines there mentioned. And if it be objected that the new government possessed at that time no district of country which had become its seat, the answer is, that neither had it at that time the dock-yards and magazines for which the statute provided protection against this crime. Every part of that section related to places yet to be acquired. Therefore, if its terms aptly described the "district of country" which has since been acquired as the seat of the Government of the United States, they must be held to apply to that district quite as certainly, and by the same rule of construction,

by which they are applied to forts and dock-yards which were not then in existence, but have been acquired since the passage of that act. We are not even embarrassed, under this theory of construction, by a suggestion that Congress must be supposed, in that case, to be legislating about a matter which then floated in uncertainty; for this very district of country, subject to ascertainment by certain measures to be taken on the part of the United States, was accepted, for the purpose of a seat of government, by the act of July 16, 1790, passed at the same session with the crimes act, and only eleven weeks later, so that its acquisition must already have been regarded as substantially an accomplished fact. We know, too, that from the beginning it had been for important reasons, the anxious purpose of Congress to remove the Government from Philadelphia, and to secure the new residence contemplated by the Constitution. In view of that purpose, it was natural that Congress should at once include this future district, when it came to provide for places under the sole and exclusive jurisdiction of the United States. But, apart from these considerations, we know of no principle which should take out of a statute which, by explicit and unlimited terms, included any and every "district of country under the sole and exclusive jurisdiction of the United States," a district which falls precisely within that description, though, like all the forts, magazines, and dock-yards of the United States, it was acquired since the passage of that act.

If the third section of the act of 1790 would apply at once to the District of Columbia when it came under the exclusive jurisdiction of the United States, it was not put aside and superseded by the general provision of the act of February 27, 1801:

"That the laws of the State of Maryland, as they now exist, shall be and continue in force in that part of the said District which was ceded by that State to the United States, and by them accepted." 2 Stat., 103.

As these two provisions were not regugnant, but could operate together, this general provision of the later statute,

for the adoption of a body of law, both statute and common, and relating to a vast diversity of subjects, did not disturb the more particular provision of the earlier statute relating to a particular subject in that District.

We believe, therefore, that the third section of the act of 1790 has been in force in this District ever since it came under the exclusive jurisdiction of the United States. But if we had any doubt upon that question, we should hold, without doubt, that it has been in force here since the 21st day of February, 1871, by virtue of the act of that date establishing a new form of government for this District. The thirty-fourth section of that act, which is now embodied in section 98 of the Revised Statutes, for the District of Columbia, provides that :

“ All the laws of the United States which are not locally inapplicable shall have the same force and effect within the District as elsewhere in the United States.”

Under the operation of this provision other laws of the United States relating to crimes have been enforced here ; and if any law can come within the description of “ not locally inapplicable,” surely the law of 1790, which by its strict and peculiar terms, is not only locally applicable, but, as we think, was originally intended to be locally applied, must do so. If it was put aside in 1801, by the adoption of the laws of Maryland, its operation was restored in 1871. The usual rule of construction as to repeals is, that a special provision, relating to a particular case or locality, is not superseded by a general provision for all places and cases ; but no such problem is presented here. Both the act of 1801 and the act of 1871 made a comprehensive provision for a whole body of laws, which should be in force here, and, to the extent of its purview, the latter provision necessarily supersedes the earlier.

We are of the opinion, then, that sec. 5339 of the Revised Statutes of the United States applies to murder committed within the District of Columbia. It will be found that upon this conclusion rest some very important considera-

tions in determining when the crime of murder can be held to have been committed "within" this District.

X The next question is whether the case presented by the record can be held to fall within this act. The contention on the part of the defendant is that murder cannot be held to have been committed within the District of Columbia, since the consequent death happened in the State of New Jersey, and that therefore the court had no jurisdiction to try, convict, and sentence him for murder. The theory of this contention is, that murder cannot be held to have been committed in a designated place, unless both the blow and the consequent death happen there. In support of this contention it has been argued that, as murder is a term of the common law, and describes a crime known to the common law, we must have recourse to that law in ascertaining not only when but where it can be said to have been committed.

It is a settled rule of construction that when a statute borrows a technical phrase from the common law the courts must resort to the same source for its definition. Whether the courts of the United States must do so for any purpose beyond this, in construing and applying a statute of the United States, on the ground that it deals with the same subject which had been dealt with by the common law, is a question which we shall consider in the proper place. Before doing so we shall consider what the conclusions of the common law actually were, and what limitations they would impose if applied to this statute. And, first, was it a conclusion—a rule of the common law—that murder was not committed in a particular place, for example, in a particular county, if the death ensued in another county? It is first stated as a fact, that, in such a case, the offender could not be indicted of murder in either county, and then it is claimed that the reason of this fact was that no complete felony had been committed in either. For a solution of this question we must turn to the higher authorities on the common law and to the facts of history.

The preamble of the statute of 2 and 3 Edw. VI has always been treated as one of the landmarks in determining

this question, and it is necessary that we also should turn to it. So much of it as relates to this subject is in the following words: ●

“Forasmuch as the most necessary office and duty of the law is to preserve and save the life of man, and condignly to punish such persons that unlawfully and wilfully *murder*, *slay*, and destroy man. * * * II. And where it often happeneth and cometh in ure in sundry counties of this realm that a man is feloniously stricken in one county, and after dieth in another county, in which case it hath not been founded by the laws or customs of this realm that any sufficient indictment thereof can be taken in any of the said two counties, for that *by the custom of this realm the jurors of the county where such party died of such stroke can take no knowledge of the said stroke being in a foreign county*, although the same two counties and places adjoin very nearly together; *we the jurors of the county where the stroke was given cannot take knowledge of the death in another county*, although such death most apparently came of the same stroke; so that the King’s majesty within his own realm cannot, by any laws yet made or known, punish such *murderers* or manquellers for offenses in this form committed and done, * . * for redress and punishment of which offences, and safeguard of life, be it enacted, &c.

These words suggest important observations. The first clause of the preamble indicates that it was the intention of the legislature to deal with cases of “murder,” and the second describes the persons who are said to have escaped as “murderers.” It was not a new offense, but the old offense of “murder,” which was to be provided for, and this was to be done by providing a sufficient indictment. The other observation is that the sole reason assigned for the escape of certain offenders was that the jurors of one county could *take no knowledge* of a stroke or a death in another county. It is not intimated that the felony was divided, and therefore incomplete in either county; while it is affirmatively stated that the obstacle in the way of punishing the crime

lay in the fact that the juries lacked power to take knowledge beyond their counties.

The assertions of this legislative preamble of course have less authority than judicial decisions concerning the actual state of the common law, and are shown by earlier decisions to be too broad. It was not true that murder could not be sufficiently indicted and punished in any case where the fatal blow was struck in one county and death ensued in another. A statement made by the court in John Lang's case, which was decided in 6 Hen. VII, p. 10, fifty-nine years before the statute of 2 and 3 Edw. VI, is conclusive authority that the crime might be tried in the county where the blow was struck, if the body was brought thither from the county where the death happened, so that the jury might have the *evidence* of the death within their lawful cognizance. After stating a case where the blow and the death happened in different counties, the court said: "In this case *it has been used*, after the death, to bring the dead man, to wit, the body, into the county where he was struck, and then to enquire and to find that he was struck, and died of that." Such a practice shows, first, that the obstacle in the way of an indictment was the limitation of the jury's power "*to take knowledge*;" and, secondly, that the murder was deemed to have been *committed* in the county where the blow was struck, notwithstanding the consequent death happened in another county.

Only a year later (7 Hen. VII, p. 8), in a case where no such device as the removal of the body appears to have been resorted to, the court went a step farther, and it was held that an indictment which laid the blow in Middlesex and the death in Essex was good because the striking was the principal act and they who could take notice of the principal offence, could take notice of the death, as accessory, though in another county. There was a dissenting opinion, but the case is authority to the point that at common law the murder was committed where the felonious blow was struck. Tremaille, J., said:

"It seems that it is not material where he died, for the striking is the principal point, but it requires death; other-

wise it is not felony ; but whether he died in one place or another is not material."

The early authorities leave no room to doubt that the common law, before its course was interrupted and confused by the statute of Edward VI, held that when the fatal blow was struck in one county and death ensued in another the murder was committed where the blow was struck. Whatever difficulty there may have been in the way of an indictment or trial lay in the question whether the jury could know anything of the death in another county.

We are not likely to appreciate the importance which then attached to this question, unless we remember that originally both the grand and petit jury found the fact wholly of their own knowledge, and that although, for some time before the statute of Edward, they might hear witnesses, yet at that very time they were at liberty to disregard the witnesses and still to find according to their personal knowledge. Both Mr. Forsyth, in his "History of the Trial by Jury," (p. 164), and Mr. Starkie, in his essay "On the Trial by Jury," (2 Law Rev., 396), cite from the case of *Reniger vs. Fagossa*, Plowd. Comm., 12, which was decided in the second year of Edward VI, the very year of the statute, a statement made by Sir Robert Brooke, then recorder of London, concerning the functions of the jury, which throws light upon the preamble referred to, and shows what was meant by a capacity *to take knowledge*. The recorder said :

"As to what has been said by the King's attorney, that there ought to be two witnesses to prove the fact, it is true that there ought to be two witnesses at least where the matter is to be tried by witnesses only, as in the civil law; but here the issue was to be tried by twelve men, in which case *witnesses are not necessary*; for in many cases an inquest shall give a precise verdict although there are not witnesses, or no evidence given to them. As, if it be found before the coroner, *super visum corporis*, that I. S. killed the dead person, and he is arraigned and acquitted, the inquest shall say *who* killed him, although they have not any witnesses; so that witnesses are not necessary but where the matter is to be

tried by witnesses only. For if witnesses were so necessary, then it would follow that the jurors could not give a verdict contrary to the witnesses, whereas the law is quite otherwise; for when the witnesses for trial of a fact are joined to the inquest, if they cannot agree with the jurors, *the verdict of the twelve shall be taken, and the witnesses shall be rejected.*"

This power of the jury to find upon their own knowledge was recognized by the courts long after the time of Edward VI, and even as late as 1670, when it was said in Bushel's case, by the court of common pleas, (Vaughan Rep., 135), that the jury being returned from the vicinage whence the cause of action arises, the law supposes them to have sufficient knowledge to try the matters in issue, "and so they must, though no evidence were given on either side in court." It was only when the practice of new trials was introduced that juries were no longer allowed to give verdicts upon their own knowledge. (Forsyth, 165; Starkie, 2 Law Rev., 398.) When this power was finally annulled by the remedy of new trials, the trial by jury had been practised for five centuries at least (Starkie, 398); and Mr. Forsyth remarks that—

"*The fiction* was still kept up by requiring them to be summoned from the hundred where the crime was alleged to have been committed until the passing of Stat. 6 Geo. IV, c. 50, by which the sheriff is now obliged only to return for the trial of any issue, whether civil or criminal, twelve good and lawful men of the body of his county. (Forsyth, 208.)"

This power to act on personal knowledge fixed the limitation of the inquiry, and the jury was understood to have cognizance of those matters only which they might thus know. This it was that determined whether it was practicable to try certain felonies in a particular county. It was inevitable, however, that commentators and courts should endeavor to explain and assign reasons for the law, and in later times it came to be the opinion of some of them that the reason why no sufficient indictment of murder could be found, as they supposed, when the fatal blow was struck in one county and death ensued in another, was, that, in con-

temptation of law, *the felony was not complete* in either. The reasons given for a fact of common law are not themselves necessarily law ; and it seems clear that, in this matter, what was only a fact touching the cognizance of juries, has been confounded with or supposed to establish, a definition of the crime of murder. Upon this hypothesis they have proceeded to show how the murder may be regarded as committed partly in one county and partly in another.

The earlier common law authorities seem to have no doubt as to where the felony was committed in such a case ; and they seem to have had no doubt even as to the cognizance of the jury, if the facts could be brought to them. But doubts on this point certainly did grow up, and the actual condition of opinion, when the statute of Edward VI was passed, is fairly stated by Hale.

“ At common law [says that great authority] if a man had been stricken in one county and died in another, it was doubtful whether he were indictable or triable in either ; *but the more common opinion was* that he might be indicted where the stroke was given, for the death is but a consequent, and might be found though in another county (9 E. IV, 48 ; 7 Hen. VII, 8) ; and if the party died in another county, the body was removed into the county where the stroke was given, for the coroner to take an inquest *super visum corporis*, (6 Hen. VIII, 10) ; but now, by the statute of 2 and 3 Ed VI, c. 24, the justices or coroner of the county where the party died shall inquire and proceed as if the stroke had been in the same county where the party died. (1 Hale, P. C., 426.) ”

The learned Chief-Justice Abbott, speaking in the case of *Rex vs. Burdett*, (4 B. Ald., 169), has assigned to Hale his proper place by treating him as much higher authority than the preamble of the statute of Edward VI, touching the previous condition of the common law.

“ It seems somewhat extraordinary [said he] that the preamble of the statute should be expressed in the terms in which we find it, *because Lord Hale mentions* the point as being doubtful at common law, and says the more common

opinion was that the party might be indicted where the stroke was given."

We think it is quite safe to have the same confidence in Lord Hale's reading of the history of this question, which was thus expressed as a matter of course by Chief-Justice Abbott.

We believe that these authorities establish the conclusion that at common law, when a felonious blow was struck in one county and death ensued in another, *murder was held to have been thereby committed in the county where the blow was struck*. They excluded the notion that the death was one of the acts of felony, and that when it happened in a different county from that of the blow, the felony was incomplete in each. In this respect the common law has undergone no change, and what it has always been is well stated in a late English decision. In the *King vs. Hargrave*, (5 Carrington and Paine, 516), the prisoner was indicted as a principal in a second degree in the manslaughter of Richard Dodd. The indictment stated that James Cox assaulted and beat the deceased, giving him divers mortal bruises, in the parish, &c., in the county of *Middlesex*, &c., "of which said bruises and contusions" the said Richard Dodd there, &c., until, &c., at the parish, &c., in the county of *Kent*, did languish, &c., and that he there died, and that the said James Hargrave, together with, &c., were then and there present aiding and abetting, &c., the said James Cox in the commission of the said felony. It was objected that the indictment was bad, as it did not charge the commission of the offense in any particular place, for that the word "there" referred to the two parishes mentioned in different counties.

Mr. Justice Pattefson said:

"*The giving of the blows which caused the death constitutes the felony. The languishing alone, which is not part of the offense, is laid in Kent. The indictment states that the prisoners were then and there present aiding and abetting in the commission of the said felony; that must of course apply to the parish where the blows, which constitute the felony, were given.*"

Of course the limitations of cognizance which grew out of the original function of the English jury to find the fact as of their own knowledge, and survived so long in that country, have no application to the juries provided by the laws of the United States, whether for service in the States or in this District. No such traditions or anachronisms were adopted by this Government when it adopted the trial by jury. When the Constitution ordained that "the trial of all crimes, except in cases of impeachment, shall be by jury," it simply provided that a body of twelve men should be the tribunal by which the fact of the crime should be tried. So much of the common law was adopted, and there the intervention of the common law ceased. The *vicinage* and its survivals have never been known to the system thus established. The jury of the Constitution was to try felonies committed on the high seas, a class of cases which the common-law jury was not competent to try; and it might be drawn from all corners of a judicial district, or from a single village remote from the place of the crime, or from any place or in any manner which the legislature should prescribe, provided it was a jury of the district in which the crime was committed. Its function was to hear witnesses, and to find the fact upon their testimony, and it was to be competent to hear whatsoever it should be lawful to prove. It was joined to the court, and was to occupy all the ground which was occupied by the jurisdiction of the court.

We have given attentive consideration to the conclusions of the common law, because it has been urged that the phrase "commit murder within," &c., as employed in the statute of 1790, is technical, and that its meaning must be ascertained by reference to that law; and because this statute has been technically treated in an early case, by means of common law definitions. We believe that the meaning of this provision against the commission of the crime of murder within the designated places is to be settled on grounds which are independent of the common law. But if there be reason for any doubt whether Congress intended to use this phrase in the sense of the common law, then we hold that accord-

ing to the principle of that law, murder is committed within the District of Columbia when the felonious blow is struck here, notwithstanding the consequent death happen without the District and in one of the States.

We turn now to the peculiar and higher ground on which we conceive this question should stand, and to considerations to which, as a court of the United States, exercising the judicial power of the United States we are required to give especial attention. However proper it may be that the courts of the States where the common law exists should treat the question of jurisdiction from the standpoint of that law, that question must be treated by the courts of the United States, wherever a fort or a magazine or an arsenal or a district of country is under the exclusive jurisdiction of the national Government, from the standpoint of Federal authority and with reference to the relation of the crime to the sovereignty of the United States.

We take it to be a fundamental rule of construction, that an independent and sovereign government is always to be understood, when it makes laws for its own people, to speak without any reference to the law of another people or government; unless those laws themselves contain plain proof of a contrary intention; and that, when it thus appears that something is actually borrowed and embodied therein from the laws of another people, the extent of that adoption is to be strictly construed, and not enlarged by implication. So far as its laws can be understood only by reference to foreign law, that reference is authorized by the law-maker, because it is necessary; but so far as its commands may be understood as original terms, and without such reference, they must be construed independently. It is only when understood to be, to this extent, the original expression of its own will that its words can communicate to its own people the whole and self-sufficient force of that will. To assume, without plain necessity, that it utters the intention of an alien law, is to ignore to just that extent its absolute independence of existence and action and will. The law before us is one to which this fundamental rule is plainly to be ap-

plied. The word "murder," was used in it as the designation of a known crime, and the statute furnished no definition beside the simple use of this term. It was used, of course, as it had always been used by all English-speaking people, and it could only mean, as it had meant in the colonies and in England, that crime which is committed—

"When a person of sound memory and discretion unlawfully killeth a reasonable creature under the peace of the sovereign, with malice aforethought, either expressed or implied."

It is necessarily understood that, to this extent, at least, the legislature had in mind the law of another government, and authorized us to turn to that law for explanation. But does this law contain any other terms which may not be understood without consulting a foreign law, and searching the decisions of foreign tribunals for the operation of that law? We say foreign law, for this Government had no common law of its own, to which the legislature could be supposed to refer, nor any law but the Constitution which established it. Therefore, we repeat, does this statute contain any other terms than the word "murder," or any other provision which cannot be perfectly and certainly understood, without assuming that a foreign law, with the peculiar methods of its operation and its application to territorial divisions, was adopted into it by implication? If there never had been such a thing as a common law decision or rule to determine the situs of the crime, the language of this statute would have been deemed certain and intelligible; has it become in itself uncertain and unintelligible because the common law had a rule on the same subject? If we are to go beyond it for explanation, the object to be accomplished by the Federal Government, and the subjects dealt with, must furnish that explanation and determine how the law was intended to operate, before we turn to a foreign explanation. Certain places, the forts, arsenals, dock-yards, and magazines of the general government, and a certain district of country to be set apart for its residence, were withdrawn from the control and protection of the States and

placed by the Constitution under the exclusive protection of the United States. The legislature of the United States was charged with the duty of protecting these places against the commission of crimes therein, and therefore it must be understood to have intended, when it provided for the punishment of a particular crime, to accomplish completely this office of protection. It is said that penal statutes must be strictly construed, but it has long been settled that they are, nevertheless, to be construed, like all other statutes, according to their plain and sensible meaning, and that a plain and sensible purpose is not to be defeated by an arbitrary method of reading its words. These words, then, must be so construed as to effectuate the intention of complete protection against the crime of murder in the places designated, if their ordinary and reasonable meaning permits such a construction. The plain object of this legislation was protection against *acts*, and the subjects dealt with in the law were *acts* done in those places. The act designated in this section was murder, the doing of that which constituted the unlawful killing of a reasonable creature under the peace and protection of the United States, with malice aforethought; and the legislature must be understood to provide for *all* acts of that nature committed within the place designated. When a particular act belongs to the class and is of the nature of the act here described as murder, the question whether it was committed in the designated place, is a question whether it was so committed *in contemplation of this statute*—not whether it was committed there in contemplation of the common law of England or of the several States. Looking only to the statute itself, then, and excluding the alleged notions of the common law—*notions which we have found not to have been a part of the law*—we find that it regards murder as an *act* committed by the offender, an *act* committed in the place designated. Read in this light, the plain and sensible meaning of the words includes all acts committed there which are found, within the year and the day limited by the law of murder, to have combined all the facts which constitute murder. We find nothing in

the statute, as we have found ~~nothing~~ in the common law, which indicates that an act is not murder in a particular place because the consequences of that act happened in some other place. If the act of the offender achieves murder, then *that act* is murder; and if that act is done in the place designated, then, in contemplation of this statute, the offender commits there the crime of murder.

We are aware that a very learned judge of the United States, whose ruling was afterwards followed by an equally learned judge of the same court, substantially held, in an early case, that the word "murder" alone, in another section of this statute, limited its application to those cases of murder in which the death happened in the same place with the felonious blow. It was pointed out that murder involved *killing*, and then, in effect, although it was not so stated explicitly, the statute was construed, as if it had read, "if any person shall unlawfully and with malice aforethought *kill* another" within a certain place. Accordingly it was held that, unless the injured person died there, he could not be said to have been killed there, and that, therefore, the accused had not there committed the crime of murder. We are sensible of the embarrassment of differing on any question of law from authorities so eminent; but we observe that in both cases the discussion of this question was brief, and consisted of little more than a statement of the proposition. Such a method of applying the covered parts of a mere formula seems to us to be inadmissible. The definition of murder which has come to us from the common law is, of course, sufficient, and it does state that murder involves killing; but it does not follow that, by recasting this formula, the statute is to be read as if it had said "every person who, with malice aforethought, unlawfully *kills* another upon the high seas, or within any fort," &c. If we should apply such a method of construction to the clause before us, we should give not only a new form to the statute, but a new effect to the definition; an effect not given by the authorities who formulated and used it. While accepting its sufficiency, they held in effect that murder described the doing of the unlawful act; the

offense, with malice aforethought, by which, within a year and a day, the stricken party was killed. Tremaille, J., has said, in the case in the year books already referred to, nearly four centuries ago, "the striking is the principal point, but it requires death ; otherwise it is not felony ; but whether he died in one place or another is not material" (7 H. VII, 8); and that doctrine was so firmly fixed that Mr. Justice Patteson repeated, in the very late case of *Rex vs. Hargrave*, "the giving of the blow which caused the death constitutes the felony." ^p though the definition stated that murder involved killing, it was consistent with the theory that the crime of murder was committed in the place where the offender acted, if his offense accomplished the killing. By recasting the definition of murder and applying it in a new form, the statute was made to punish in respect of the consequences rather than in respect of the offense which caused and ultimately included the consequences. *

The intention of this statute, as to the question whether a murder was to be regarded as committed in the places named, is further shown by the nature of those places. The law contemplates that the injured party may languish, and that if he dies within a certain time the death may be traced to the blow. But it is known that a dock-yard or a magazine would afford no accommodations for persons stricken by mortal blows. Could it have been intended that the offense should not be included in the statute, unless he languished and died there? It was probable that, in almost every instance where a mortal blow was struck in such a place, the victim would be carried from it into a place not within the exclusive jurisdiction of the United States. Could it have been intended that the statute should fall to the ground the moment he left the door of the magazine, and that if he died just outside of its limits no murder was committed there, although all the elements of murder were combined in the case? If the very terms of this statute seemed to exclude such a case, it would be inadmissible to argue *ab inconvenienti* that they did include it ; but such considerations are proper in determining whether, by reasonable construc-

tion, they do include it. In referring to them we only keep in mind that it was the duty and the probable intention of the legislature to furnish to the places committed to its exclusive care complete and effectual protection against criminal acts. As a matter of *power*, it was competent for the legislature to provide for such offenses wherever the death might happen. The question is, whether it actually did so provide by this statute, or omitted what, so far as arsenals, dock-yards and magazines were concerned, were likely to be the most numerous class of cases happening there. We hold that these cases were not omitted, and that where a murder is committed at all, this statute applies to it, if the fatal blow was struck in one of the designated places, notwithstanding the consequent death happened in another place.

There is yet one other consideration which we conceive to be important, namely, that the construction which we have given to this statute is consistent with the intent of the Sixth Amendment to the Constitution. That article provides that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district *wherein the crime shall have been committed.*" The Constitution had already declared that: "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed;" but the protection of accused persons against the hardship of removal to a distant place of trial, and of increased difficulties of defense, was a matter of so much concern that a further limitation was added. The important point is that, under both provisions, the place of trial and the tribunal were to be determined by the place where the crime was committed, and that this protection of accused persons was not to be defeated by any *unnecessary* theory as to where a crime must be deemed to be committed.

This provision of the fundamental law had no reference whatever to the common law, or to the peculiarities of any external system. It was intended to be an expression in original terms, a provision which was sufficient in itself and

which spoke for itself ; and it plainly assumed that the place wherein a crime was committed was the place where the *act* of the offender was done. It was, on the one hand, the general intent of the Constitution that the federal power to punish acts which were crimes against the United States should be plenary, and, on the other, it was the intent of this protection of the accused party, that crimes should be deemed to be committed where the manifest act was done, and not where the mere consequences of that act finally happened. The application of this principle of construction does not depend on the question whether the place in which the act is done is in a State and judicial district of the United States. The provision referred to contains, independently of that question, a rule for determining *where* a crime shall be said to have been committed. It imports that the crime shall be held to be committed in the place where the offender manifestly acts, and it forbids any law which should provide for his trial in a district where the ultimate consequences of his act happen, but where he does not act. If we apply this construction of the Constitution to the crime of murder, it is plain that the power of the United States to punish *as* murder a crime which proves ultimately to be murder is plenary, and that it is the intent of the same supreme law that that crime shall be deemed to have been committed in the place where the act was done by which, the murder was brought about. This rule for ~~for~~ placing the commission of the crime is not dependent upon the question whether this is a judicial district of the United States. It applies to the construction of the statute of 1790, and governs us in determining when crimes are committed here.

We hold, therefore, that the criminal court had, upon the case shown by the record, jurisdiction to try, convict and sentence the defendant for murder committed within the District of Columbia.

We have now to inquire whether error occurred in the trial.

It appears that several experts in insanity and unprofessional witnesses who had knowledge of the defendant, were asked whether, in their opinion, he knew the difference between right and wrong, and to this question, and the affirmative answer, exception was taken, on the ground that a witness can only state an opinion as to sanity or insanity, and that knowledge of right and wrong is a conclusion which must be left to the jury. Insanity is a defense on the very ground that it disables the accused from knowing that his act is wrong. The very essence of the inquiry is whether his insanity is such as to deprive him of that knowledge. If a witness is competent to give his opinion as to the mental condition of the accused, he is competent to state his opinion as to the degree of capacity, or of incapacity, by reason of disorder, and whether the disorder seemed to have reached such a degree as to deprive him of the knowledge of right and wrong. That capacity or incapacity is itself a question as to the extent of the disorder, if disorder exists, and is not a conclusion to be drawn from the existence of insanity. These witnesses were competent to speak to the question of sanity or insanity, and, therefore, as to this question as to one of its degrees. We find no error in the ruling which admitted this question and the answer.

Dr. Fordyce Barker, an expert on the subject of insanity, was asked :

“Is the habit of boasting of intimacy with people holding high position, and possessing influence and power, when the fact is otherwise, any evidence, in your judgment, as a scientist, of an insane delusion ?”

The answer was :

“It is not an evidence of a delusion of an insane person, because it is not the result of disease. It is a result of vanity and self-conceit and love of notoriety. These are vices and not diseases.”

To this answer exception was taken, because the witness,

in determining the nature of this trait, said it was a vice and not a disease. The question whether a certain trait was an indicium of insanity involved the question of its nature, and we do not perceive that the witness exceeded the limits of the inquiry in stating precisely what that trait was. But there is another consideration. The act of killing the deceased was conceded, and this answer could have no tendency to prove that the accused had committed it. It was not admitted as bearing upon the question of guilt. The only issue was sanity or insanity, and the answer affected that issue alone. It could, therefore, do no injury to the defendant's rights *as to the act*, and it was not irrelevant to the issue of insanity. The opinion of an expert is not regarded as an invasion of the rights and office of the jury, and, if this opinion, as to the actual character of a trait, was substantially a statement of its relation to insanity, it was not an interference with that office. We find no error in this ruling of the court.

Mrs. Dunmire, who was married to the defendant in July, 1869, and was his wife for four years, but had been divorced from him, was asked the following question :

"I will ask you to state to the jury whether, in your association with him (the defendant), you ever saw anything that would indicate that he was a man of unsound mind?"

The court had ruled that the confidential communications between husband and wife were protected in the examination. The question was admitted, under exception, and the answer was :

"I never did."

This question called for the witness' observation of the defendant's soundness or unsoundness of mind, and the objection goes partly on the ground that, notwithstanding the ruling of the court that confidential communications between the husband and wife were protected, she may have included, as a part of the basis of her answer, what are understood as *communications* from her former husband. We think that the exhibition of sanity or insanity is not a communication

at all, in the sense of the rule which protects the privacy and confidence of the marriage relation, any more than the height or color, or blindness, or the loss of an arm of one of the parties is a communication. The rule which is supposed to have been violated was established in order that the conduct, the voluntary conduct, of married life might rest secure upon a basis of peace and trust, and relates to matters which the parties may elect to disclose or not disclose. It was provided in order that matters should not come to the light, which would not do so at all without a disturbance and disregard of the bond of peace and confidence between the married pair. Therefore it has not been applied to any matter which the husband, for example, has elected to make public, by doing or saying it in presence of third persons along with his wife ; and it cannot be applied to that which, whether he will or no, he inevitably exhibits to the world as well as to his wife. Some diseases a husband may conceal, and he may choose whether to reveal them or not. If he should reveal the existence of such a disease to his wife, in the privacy of their relation, she may never disclose that communication, even after the relation between them has ceased.

But sanity or insanity are conditions which are not of choice, and when the disease of insanity exists, the exhibition of it is neither a matter of voluntary confidence nor capable of being one of the secrets of the married relation. The fact that there are instances of cunning concealment for a time, does not affect the general truth that insanity reveals itself, whether the sufferer will or no, to friends and acquaintances as well as to the wife. In short, the law cannot regard it or protect it as one of the peculiar confidences of a particular relation. It may be added that it is difficult to perceive, in any view of this subject, how the witness' denial that she had seen indications of insanity can be said to reveal any fact which her husband had communicated to her. If our opinion that sanity or insanity cannot be a communication within the meaning of the rule should be wrong, it must be remembered that *sanity* is a presumption of law,

and that the wife would seem to reveal nothing to the world, unless she should say that the existence of *insanity* in her husband had been communicated to her by his conduct during their connection. We are of opinion that no error was committed in receiving this evidence.

Several witnesses were allowed to testify to acts of the defendant in 1872, and in two or three years following, which were fraudulent. Evidence had been introduced on his part, for the purpose of proving insanity, which searched the history of his whole life, down to the time of the act charged in the indictment. The defendant himself had, as a witness in his own behalf, gone over the same ground. In this body of defensive evidence his moral nature and traits had been presented, as a means of showing that acts done by him must be accounted for by a conclusion of insanity. It was competent to show, in rebuttal, that the grounds on which this inference of insanity was based, did not exist, and to do this by exhibiting particular acts and conduct of the defendant, contemporaneous with the history produced on his part, which tended to disprove the existence of those grounds. If a conclusion might be drawn from his moral nature that his acts must be insane, it was relevant and proper to show that his *real* moral nature was one which did not call for such an explanation.

After comparing the evidence, as to particular acts, offered on both sides, we are of opinion that the evidence in rebuttal was responsive to the evidence in defense, and was admissible. It must be remembered that the killing of the deceased was admitted; the implication of malice had already been made when the prosecution rested their case. The issue now was whether the defendant was responsible for that act by reason of insanity. The application of his improper acts was limited, therefore, to that issue. For these reasons we find no error in the admission of the facts referred to, and for the same reasons we find none in that part of the charge to the jury which related to this point.

Exception was taken to the refusal of the court to instruct the jury concerning the effect of an incapacity to act upon

and follow a knowledge of the difference between right and wrong. The instruction given was in the following words :

“ If he is laboring under disease of his mental faculties—if that is a proper expression—to such an extent that he does not know what he is doing, or does not know that it is wrong, then he is wanting in that sound memory and discretion which makes a part of the definition of murder.”

To this statement, counsel asked the court to add ; “ or does not know that it was wrong, or if he did know it was wrong, had not the power to resist it,” which was refused. It appears that the court did not afterwards state to the jury what the law was, in reference to want of power to act upon an actual knowledge of the difference between right and wrong.

We are not called upon by this exception to decide what the true rule of law is upon that subject, but whether the court erred in not laying down any rule. It is not error to refuse to instruct the jury upon matters of law, where no evidence tending to raise the question had been introduced ; and we think the court was clearly right in holding that while no evidence tending to show an incapacity to act upon a knowledge that the act was wrong had been introduced, the affirmative tendency of the evidence was to support a wholly different theory and ground of defense. We are of opinion that the evidence in the case did not call for any ruling upon the point made, and that no error has intervened in this matter.

Exception was taken to the judgment, on the ground that the sentence fixes a day for execution in violation of section 845 of the Revised Statutes of the District of Columbia. The objection is, that under this section execution must be postponed till after the next term, namely, the April term of the court in general term, and that, in contemplation of law, the present extends to the time fixed for the beginning of the October term ; so that the day fixed by the sentence falls within and not after this term.

The section referred to is in the following words :

“To enable any person convicted by the judgment of the court to apply for a writ of error, in all cases where the judgment shall be death, or confinement in the penitentiary, the court shall, on application of the party accused, postpone the final execution thereof to a reasonable time beyond the next term of the court, not exceeding in any case thirty days after the end of such term.”

The first day of a term of this court, but not its duration, is fixed ; the term ends whenever the court adjourns *sine die*, and is then determined for all purposes. As section 845 was framed in contemplation of this theory of the ending of a term, it follows that, if the day to which final execution of a sentence is postponed falls after the next term of this court, as determined by its adjournment *sine die*, execution is postponed in accordance with the meaning of that section. If it should happen in any case that this court has prolonged the “next term” referred to until the day set for final execution is reached, the criminal court would then be authorized upon application of the party, to postpone execution, so that it should fall after the actual adjournment *sine die* of this court. It is not shown that the terms of the sentence have violated section 845, and we find no error in this action of the court.

Some other exceptions of minor importance were discussed in the argument. We have considered them, and have found no error in the rulings to which they refer. A new trial is therefore denied, and the judgment of the court is affirmed.

I will here observe that although I was requested to give the opinion of the court, there were some considerations which I found it inconvenient to combine with those that I have prepared, and for which I was indebted entirely to the investigations of my brother, Mr. Justice Hagner. I have asked him to have the kindness to help out this opinion by a separate suggestion of those grounds.

Mr. Justice HAGNER. It was asserted with much confidence by the counsel of the prisoner, in his earnest argument, that under the law as it existed in Maryland at the time of the cession of the District of Columbia to the United States, if a mortal blow had been given within the territory now comprehended in the District boundaries, and the victim had died in another jurisdiction, the offender could not have been punished within the State of Maryland.

The decision of this question is not essential to the position upon which the opinion of the court has been placed—(that the crime is punishable under the statutes of the United States, without reference to the antecedent conditions of the State law before the crimes act was enacted)—but the point was much pressed, and has been carefully considered by the court; and in compliance with the request of my brother James, I will state the result of our examination of the statutes of Maryland bearing on the subject.

Before the Revolution, the courts of the Province having criminal jurisdiction were known as the Provincial court, and the County courts. The former possessed general jurisdiction over the entire Province in all matters criminal as well as civil; while to the County courts was entrusted the punishment only of the more trivial offenses.

The first State Constitution of 1776 transferred the authority of the Provincial court to a tribunal known as the General court, and retained the County courts under their old name. By law the sessions of the General court for all the counties lying on the east side of Chesapeake Bay, known as the *Eastern Shore*, were required to be held in Talbot County, and those for all the counties of the *Western Shore* were to be held at Annapolis. Various statutes were enacted extending the criminal jurisdiction of the county courts, from time to time, until the year 1785, when the legislature at the November session passed a statute, chapter 87, entitled “an act concerning jurisdiction,” by the seventh section of which it was declared—

“§ 7. That the justices of the several and respective county courts shall have full power and authority, unless in cases

particularly directed by law to be tried in the general court, to try, according to law, all and every person and persons who have committed or shall commit any offense or crime whatsoever, although it may subject such person or persons to the pains of death, and upon conviction of the offender or offenders; in due course of law, *in the county court of the county in which the crime or offense shall be committed*, give judgment according to the nature and quality of the crime or offense."

By section 8 it was provided: "That every person charged, apprehended, or indicted for any capital crime, or such as will subject such person upon conviction to an infamous punishment, shall have a right, upon application to any judge of the general court, or any two justices of the county court, to a *habeas corpus cum causa*, to remove himself or herself, with the proceedings in the case, to the general court, where such person shall be tried upon such removal.


It is evident that the legislature, by the 7th section of the statute, entrusted to the county courts the amplest power to try all criminal cases whatsoever; with the positive condition, however, that the trial should be had in the county *where the crime should be committed*. This expression was afterwards introduced into the Constitution of the United States in two places, and into the crimes act, and in our opinion was designed by the legislature to have the same signification we have already, in the opinion of the court, ascribed to that act of Congress. The county in which the crime is *committed*, upon every fair principle of construction and reason, must be held to mean the county within which the act of violence was performed, or as expressed in *Riley vs. State*, 9 Hump., 656, "where the active agency of the perpetrator was employed."

The *common-sense* signification of the expression cannot admit of serious question when subjected to practical test.

In 1865 Booth inflicted a mortal wound upon President Lincoln in Ford's theatre. The dying President was removed to a dwelling on the west side of Tenth street. If the boundary line of the District had passed between the two places, as might well have been the case, Mr. Lincoln would have died in

another jurisdiction. It cannot be contended that Booth did not *commit* murder. If it be asked *where* it was committed, can it be said, with any appearance of reason, that he committed it in the *dwelling*, where he had never set foot.

Can it be supposed that the legislature when deliberately enacting a statute "concerning jurisdiction," intended to perpetuate a supposed technical rule that never would have been thought of except for the peculiar constitution of the juries in remote times, which never had place in this country at all?



The legislature expressly repudiated the idea that any crime punishable by the county courts should thereafter be supposed to be capable of performance in *two* counties. Whatever might be its character or atrocity, it was declared that it *should* thereafter be held to have been perpetrated only in *one* jurisdiction, viz., "the county *in which* the crime shall be *committed*."

The supposed doubt as to the law where a murder had been done under the conditions referred to in the preamble of the statute 2 and 3 Edward VI, must have have been familiar to every lawyer of the day. That statute had been in force in Maryland since its settlement, one hundred and fifty years before. (Kilty's Report of the Statute, p. 165). It would not only have been an inexcusable neglect of duty in the legislature to have refrained from adopting sufficient words to remove any possible doubt on the point, while they then had the subject of jurisdiction in hand; but it would have been in violation of a cherished principle, familiar to the people of the confederation and of the State, to have admitted the possibility that an accused person should thereafter be triable in a different jurisdiction from that where the act of violence occurred. It was one of the complaints in the Declaration of Independence against the English king that he had given his assent to laws which had for their object "*transporting us beyond seas*" for trial. And in article 18 of the declaration of rights prefixed to the Maryland constitution of 1776, it was declared that "the trial of facts *where they arise* is one of the greatest securities of the lives, liberties, and estate of the people."

And this same principle was subsequently incorporated into the Constitution of the United States, in Article 3, which declared that—

“The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be had in the State *where the said crime shall have been committed*, but when *not committed* within any State, the trial shall be at such place or places as the Congress may by law have directed.”

And it was still further enforced in the 6th amendment to the Constitution which limited the selection of the jury to the district, as well as State, “*wherein the crime shall have been committed.*”

If the legislature had undertaken to determine the place of trial, as between the locality where the blow was stricken and that of the death of the victim, every consideration of convenience, justice, public policy, and observance of Constitutional injunction, would have conspired to induce them to provide that the trial should occur within that jurisdiction whose laws were charged to have been violated by the accused party, rather than to require his removal from the place “where the facts arise” to a State perhaps far remote from friends, and from the witnesses of the transaction; to a jurisdiction where the laws might, on the one hand, be of far greater severity, or where, on the other, the deed might not be considered criminal at all.

It was not necessary that the legislature should employ many words to express their purpose to establish this rule of law for the future. An apt phrase or word was sufficient, and they selected and adopted as adequately declaring their meaning the words, “*where the crime shall be committed;*” which were in entire sympathy with the provisions of the fundamental law referred to.

Subsequent statutes of Maryland support this view of the act of 1785.

By chapter I of November session, 1787, which recited the insecure condition of the public jails of the State and the hazard of keeping prisoners until brought to trial at the stated terms of the ordinary courts, the governor was

authorized, upon application, "to issue commissions of oyer and terminer and jail delivery for the trial of all crimes, offences and misdemeanors whatsoever, that have arisen or may arise in any county within this State, whenever it shall appear to him that there is a necessity such commission should issue."

Neither in this act authorizing the creation of these courts of oyer and terminer, nor in the eighth section of the act of 1785, authorizing the general court to try certain criminal cases brought before it by *habeas corpus*, was there the same plain injunction that the trial should be in the jurisdiction *where the crime was committed*, as had been adopted with respect to the *county courts*, in section 7 of the act of 1785, chapter 87.

The absence of such a provision as to the General court and the courts of oyer and terminer, gave rise to the passage of the act of November session, 1789, chapter 22, entitled "An act to ascertain the mode of trial in certain cases," which is in these words :

"Whereas doubts have been entertained if a mortal stroke be given on one shore of this State, and the parties stricken die on the other shore thereof, where and in what manner the party giving such mortal stroke shall be tried :

II. "*Be it enacted by the general assembly of Maryland*, That from and after the end of this session of assembly, if a mortal stroke shall be given within the body of any county on one shore of this State, and the party so stricken shall die thereof within a twelve-month and a day from the time of such stroke given, within the body of any county on the other shore of this State, the party giving such mortal stroke, and all aiders and abettors, &c., shall and may be indicted, arraigned, and tried, in the general court of either shore, or by justices of oyer and terminer, sitting either in the county where the stroke shall be given, or in the county where the death shall happen, and judgment shall be given, and execution had, in the same manner as if the stroke and

death both happened on the same shore, or in the county where the said justices of oyer and terminer shall sit."

Section 8 of this same statute declared—


"Whereas the two shores of this State are divided by the waters of Chesapeake Bay, and in some instances the counties of this State are divided by the waters of rivers or creeks, which may occasion doubts as to the trial of homicide in certain cases :

"*Be it enacted*, That from and after the end of this session of assembly, if a mortal stroke shall be given on the said waters of the Chesapeake, and the party so stricken shall die thereof within a twelve-month and a day, or if a mortal stroke shall be given in any part of this State, and the party so stricken shall die thereof within a twelve month and a day on the said waters of the Chesapeake, in such case the party giving such mortal stroke, and all aiders, abettors, comforters, and accesories thereof and thereto, shall and may be indicted, arraigned, and tried, in the General court of either shore, or before justices of oyer and terminer, sitting in any county of either shore, and judgment shall thereon be given, and execution had, in the same manner as if the stroke and death had both happened on either shore."

By section 4 a similar provision was made where the stroke occurred on the waters of any river or creek dividing any counties and the death occurred on shore, or where the blow was stricken in any such county and the death occurred on any such river or creek.

The careful omission of all mention of the *county courts* from this act, shows that the law-makers considered they had already made ample provision for the trial by *those* tribunals of any crime, murder included, in the county where the offense was *committed*, irrespective of the place of death of the murdered person.

The jurisdiction of the county courts in all criminal cases was confirmed by chapter 50 of November session, 1790 ; and by chapter 43 of November session, 1796 ; and remained unimpaired up to the passage of the act of Congress of 27th



February, 1801, when the statute was passed creating the court which was the predecessor of this tribunal.

In our opinion, then, it is clear beyond question that if a mortal blow had been stricken before the session, in either of the counties, parts of which constitute the District as it now exists, and the party stricken had died in any other jurisdiction, the county court of the county *where the blow was stricken*, would have had undoubted jurisdiction to try and sentence the offender.

Much reliance has been placed by the counsel of the defendant upon two decisions alleged to have taken place within this jurisdiction, which, it is said, settles this question according to their contention.

The first case is the *United States vs. Bladen*, reported in 1st Cranch, Circuit Court Reports, 548. The party there was indicted for manslaughter. It appeared that the fatal blow was struck in Alexandria and the party died in Maryland, and it was decided by the court that they were without jurisdiction to try him for the homicide, although he could be held for the assault. It is worthy of remark in this case that Mr. Walter Jones, one of the most eminent lawyers of the country, on that occasion represented the United States. He insisted, as we have decided this day, that the recitals in the statute of Edward VI were not correct statements of the common law at the time of its enactment. But the circuit court of the District of Columbia was holding its session in Alexandria, within a portion of the District ceded from Virginia, and its decision was controlled by the state of the law in Virginia. No such provision existed in the Virginia statutes, at the time, as had been incorporated, as we have shown, into the law of the State of Maryland. It by no means follows that the court would have decided the point in the same way if a case with similar facts had been presented at its next session on the Maryland side of the Potomac, in view of the explicit declarations of the Maryland statutes.

The other case referred to is that of the *United States v. James Rolla*. The brief of the defendant's counsel has

copied literally the statement of the case taken from the American Law Journal, published in 1850. We have examined the original papers in the case, and are satisfied that there is nothing appearing in them that would justify the conclusion that the point now before us was considered or decided by the court. It appears that on the 30th of June, 1848, the grand jury indicted a certain James Rawley for manslaughter. The indictment, which I hold in my hand, declares that on the 25th of April, in the county of Washington and District of Columbia, the said Rawley, in and upon a certain person to the jurors unknown, did make an assault and inflict upon him with a stick, which he then and there held, a mortal wound, of which the said person unknown, on the same day and year aforesaid, in the county aforesaid, died. The complete docket entries in the case are as follows:

“June 30th, 1848. No. 449. United States v. James Rawley. Manslaughter. Indictment. July 10th, *nolle prosequi*, and the prisoner remanded to wait the requisition of the governor of Maryland or Virginia, and the district attorney to give immediate notice to the authorities of those States.”

It seems hardly consistent with this entry that any offense could have been committed within the District, for in Bladen's case the court had held that if the blow was struck in Alexandria, within its jurisdiction, the party might be indicted for the assault. It would seem rather then, as a *nol. pros.* was entered, that it had been ascertained after the finding of the indictment that no part of the offense had occurred within the District of Columbia. On the 23d of October, 1848, the said Rawley, stating his name as Rolla, applied for a habeas corpus, and was brought before Judge Crawford on the same day by the marshal, with a statement of the cause of his detention, namely, that at some time in the month of April, 1848, in the county of Washington, he had struck a certain Saulsbury with a piece of wood and caused his death. The hearing was adjourned until the 30th

of October, 1848, and on the 27th of November, 1848, the judge passed the following order :

“The prisoner brought before me according to adjournment, and it being stated by the district attorney that the attorney-general of Maryland had communicated his opinion that Maryland had no jurisdiction in the case, and the authorities of Virginia not having, although twice at least informed of the facts, taken any measures to demand James Rawley for trial in Virginia, I feel compelled, after the lapse of time and the circumstances above named, to discharge him from custody, which is ordered.”

And this is the entire record of the case. Manifestly there is nothing appearing in these papers to justify the inference that the point now made was either insisted upon or decided. The statement of the judge would rather indicate that the grand jury had indicted a person who had been improperly accused, and who had, in fact, committed no such crime at all.*

*Shortly after the delivery of the above opinion, counsel for the prisoner made application to one of the Justices of the Supreme Court of the United States (Mr. Justice Bradley) for a writ of *habeas corpus* on the ground that this court was without jurisdiction to try the prisoner for the offence charged in the indictment. The application, however, was refused. The opinion of the learned Justice, giving his reasons for denying the writ, will not be an unfit conclusion to one of the most interesting and important cases ever decided in this District.

IN THE SUPREME COURT OF THE UNITED STATES.

*In the Matter of the Application of Charles J. Guiteau }
for a writ of Habeas Corpus.*

Charles J. Guiteau, being in prison under sentence of death for the murder of President James A. Garfield, makes application for a *habeas corpus* to be discharged from said imprisonment, on the ground that the criminal court of the District of Columbia, by which he was tried and convicted, had no jurisdiction of his offense. The supposed want of jurisdiction is based on the fact that, although the mortal wound was inflicted in the District of Columbia, the death of the President took place in New Jersey ; whereas the act under which the indictment was found (section 5339 of the Revised Statutes), only declares murder within any fort, arsenal, dock-yard, magazine, or in any place or district of country under the exclusive jurisdiction of the United States, shall suffer death, and jurisdiction is only given to the court to try “ crimes and offenses committed within the District.” Revised Statutes District of Columbia, sec. 763, as amended.

It is contended that the murder was committed only partly within

the District of Columbia and partly within the State of New Jersey, and, therefore, cannot be said to have been committed within the District of Columbia.

By the strict technicality of the common law this position would probably be correct, although Lord Chief-Justice Hale, one of the greatest criminal lawyers and judges that ever lived, uses the following language: "At common law," says he, "if a man had been stricken in one county and died in another, it was doubtful whether he were indictable or triable in either, but the more common opinion was that he might be indicted where the stroke was given, for the death was but a consequence, and might be found, though in another county, and if the party died in another county, the body was removed into the county where the stroke was given, for the coroner to take an inquest *super visum corporis*."

This case shows that in Lord Chief-Justice Hale's opinion the principal crime was committed where the stroke was given, and that when the production of the dead body gave the jury ocular demonstration of the *corpus delicti*, the difficulty of jurisdiction was overcome. But to remove the doubt as to the power of jurors to try such a case, it was enacted by the statute 2 and 3 Edward VI, c. 24, that the murderer might be tried in the county where the death occurred; and to remedy the difficulty where the stroke, or the death, happened out of England, it was enacted, by a subsequent statute, 2 George II, c. 21, that the trial might be in the county where the stroke was given if the party died out of the realm; or where the death occurred, if the stroke was given out of the realm; this, in effect, making the murder a crime in the county in which either the stroke was given or the death occurred. These statutes, as the Supreme Court holds, and as their reasoning satisfactorily shows, were in force in Maryland in 1801, when the Supreme Court was organized, and by the organic act of Congress became laws of the District of Columbia. ?

If, therefore, the District had continued a part of the State of Maryland, with those laws in force, and if the murder in question had taken place exactly as it did, it would have been considered a murder committed within the State of Maryland, and within the county out of which the District was carved, and would have been indictable and triable in such county. When, therefore, Congress in 1801 conferred upon the courts of the District jurisdiction to try all crimes and offenses committed within the District, it gave jurisdiction to try the murder of which the prisoner has been found guilty, the present law being a mere codification of that enactment. For the same reason the crimes act of 1790, when it came to operate upon the District, became applicable to such a murder.

It may be objected that the conferring jurisdiction to try the crime of murder in such a case when only the stroke was given within the territory and the death occurred elsewhere, and *vice versa*, did not make it murder in the territory. But this is a purely technical objection. There is no doubt that the legislature might have enacted, in so many words, that if either the mortal stroke should be given, or the consequent death should happen within the territory, it should be deemed a murder committed there.

The statute adds, substantially, that effect and meaning, and after it went into operation the crime became a crime within the territory.

It is unnecessary to say that such a construction of the statutes and of the act of Congress much better subserves the purposes of justice, and is more in consonance with their object and intent, than the extremely technical construction contended for on behalf of the prisoner.

This view of the subject renders it unnecessary to examine the

decisions of Mr. Justice Washington, in the case of Magill; of Mr. Justice Curtis, in the case of Armstrong, or of the Circuit Court of this District in the case of Bladen, since they were all cases in which no statute like that of 2 George II, could be invoked.

It seems to me, therefore, after very careful consideration of the question, that the criminal court of the District had jurisdiction to try the case of Guiteau, and that a *habeas corpus* for his discharge ought not to be allowed. I should be very reluctant to interfere with the course of justice in any case in which a fair and impartial trial has been had, and the jurisdictional question has been fully considered, unless it appeared to me quite clear that a mistake had been made in assuming jurisdiction, or, at least, that it was a question of very grave doubt.

The question in this case was very fully and learnedly discussed both by the learned judge who tried the cause and by the Supreme Court in General Term; and after a careful examination of the arguments of counsel on both sides and of the learned opinion of the judges, with such reflection as I have been able to give to the subject, I have reached the conclusion above stated.

In a case of grave doubt and difficulty, and appellate in its character (as this case is), I have a right, undoubtedly, to refer the matter to the Supreme Court of the United States, as was done in *Ex parte Clarke* (100 U. S., 399); but such is not the usual course, and is not to be followed, if it can well be avoided. Prompt action is one of the beneficial characteristics of the remedy of *habeas corpus*, and is due both to the prisoner and the administration of justice.

The law gives jurisdiction to, and places the responsibility upon, a single judge to grant or refuse the writ; and it is his duty to decide an application therefor if he can do so with reasonable confidence in his own conclusion; and it is his right to do in every case.

The application is denied.

APPENDIX.

Opinion of Mr. Justice Cox upon the Jurisdictional Question in the Case of United States v. Guiteau.

DELIVERED IN THE CRIMINAL TERM S. C. D. C., JANUARY 10, 1882.

At an early stage of this case I had expressed a preference that if it was designed to raise this question, it should be presented in a preliminary form, by way of demurrer or plea, because a determination adversely to the jurisdiction would have spared us all the labor and trouble of this trial. However, counsel had the privilege of raising the question at any stage of the case. The jurisdiction of the court had been publicly discussed and seriously challenged, and I felt it incumbent upon me not to seem to ignore a question so vital to the rights of the defendant. I deemed it my duty, therefore, to investigate it somewhat. It is proper, perhaps, that I should now express the opinion which I have reached, in the course of my investigation of this question before discussing any other points, although the opinion is somewhat long, and, perhaps, it may be tedious.

Several of the counts of this indictment show that the President was shot in the District of Columbia and died of the wound so inflicted, in the State of New Jersey. It elsewhere appears that, after his death, his body was brought back to the District of Columbia.

These facts are also sufficiently shown in the evidence.

A question is raised as to the jurisdiction of this court to try and punish an offense committed under these circumstances.

It has been supposed that this case is provided for by the United States Revised Statutes, and especially section 731, which enacts:

“ When any offense against the United States is begun in one judicial *circuit* and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either

district, in the same manner as if it had been actually and wholly committed therein."

The section begins by imposing a penalty for conspiring to commit any offense against the laws or to defraud the United States. And it closes with the paragraph, "And when any offense shall be begun," &c.

The context shows that it was directed against frauds upon the revenue and was meant for cases in which different parts of the fraud were perpetrated in different districts. But, conceding that the re-enactment of the clause by itself and as an independent section, in the revision, will give it a more extensive application, it is still an offense against the United States only, which comes within its purview. The class of cases for which it was originally intended were, *in their nature*, offenses against the United States and could not be offenses against any other authority. The offense we are now dealing with is not an offense against the United States, except in consequence of its having been committed in territory under exclusive Federal jurisdiction. If committed in a State, it would have been an offense against the State. If a fatal wound had been given in a State, followed by death in a State, but within the limits of a different Federal judicial district, it would have been still an offense against a State only. And if such an offense can be divided into parts and the mortal stroke be called one part and the death another, if either was committed in a State, to that extent it was not an offense against the United States, and either the offense was not begun or it was not completed, against the United States. It could not, therefore, be called an offense against the United States, begun in one place and completed in another, and consequently such a case does not come within the purview of the statute at all.

But besides that, the statute refers to offenses begun in one *judicial circuit* and completed in another, and makes it punishable in either *district*. Now, what judicial circuits and districts of the United States are is settled by law, and is easily determined. The whole judicial system of the United States is mapped out in the Revised Statutes.

Section 530 declares that "the United States shall be divided into judicial districts as follows"; and it then proceeds to designate by name the States, and parts of States, which shall compose each district; and the District of Columbia has no part in this arrangement.

Further on, section 604 groups all these districts, again, into nine circuits, to which the District of Columbia, is equally a stranger.

It need hardly be observed that the title "District of Columbia" represents a political division, and never had any reference to the judicial system of the United States. The original judicial system of the United States was created for the States in 1789, before the District of Columbia had a separate political existence, and the latter has never been engrafted upon it by any subsequent amendments.

The provision, therefore, for punishment of offenses begun in one judicial circuit and completed in another, can have no application to offenses begun in the District of Columbia and completed within a State.

Nor is any help to the opposite view to be derived from section 93 of the Revised Statutes of the District of Columbia, which enacts that—

"The Constitution and all the laws of the United States which *are not locally inapplicable* shall have the same force and effect within the District as elsewhere in the United States."

An act directed at offenses committed within a judicial circuit or district has precisely the same effect as if it had described the States or parts of States composing the same. If it speaks of an offense, *e. g.*, begun in the first circuit and completed in the second, it is as if it described the very States embraced in each. Such a law would, of course, be locally inapplicable to the District of Columbia—as much so as a law to punish smuggling in California.

The only legislation which could affect the application of section 731 of the general Revised Statutes, would be that which would create in the District of Columbia a judicial circuit or district.

Nor does section 760 of the Revised Statutes of the District affect this question. That section is :

"The Supreme Court shall possess the same powers and exercise the same jurisdiction as the circuit courts of the United States."

Now, it is elementary law that the jurisdiction of the circuit courts over crimes is statutory only.

I have already shown that in a case like the present, if a part of the offense be considered as committed within a State and outside of exclusive Federal jurisdiction, it is not the case provided for by section 731, the only statute supposed to cover the case, and that it would not be within the jurisdiction of a circuit court. Section 760 aforesaid, therefore,

would not confer jurisdiction upon the Supreme Court of the District.

Section 5339, Revised Statutes, imposes the punishment of death for murder committed within any place or district of country under the exclusive jurisdiction of the United States, and also for a murder committed by inflicting a wound on the high seas or in any arm of the sea, river, harbor, &c., of which the wounded party dies elsewhere; but, strangely, omits the case of a wound inflicted on land within the exclusive jurisdiction of the United States, resulting in death elsewhere. So that we derive no aid from the statutes of the United States in such case. A murder committed here is punishable here, but if, as in this case, the fatal wound is inflicted here and the death occurs elsewhere, the question is, whether the punishable crime is committed here. We look in vain to the statutes of the United States for enlightenment on this subject.

There is, however, a statute of 2 Geo. II, ch. 21, passed in 1729, providing for the trial of murders in cases where either the stroke or death only happens within that part of Great Britain called England; which enacts that when any person "shall be feloniously stricken or poisoned at any place within that part of Great Britain called England, and shall die of the same stroke or poisoning upon the sea, or at any place out of that part of the kingdom of Great Britain called England * * * an indictment thereof found by the jurors of the county in that part of the kingdom of Great Britain * * * shall be good and effectual in the law * * * as if such felonious stroke and death thereby ensuing * * * had happened in the same county where such indictment shall be found."

If this statute was in force in Maryland, it is in force here, and exactly meets this case.

The statute is not included in the list which Chancellor Kilty prepared in pursuance of a resolution of the Maryland legislature of 1809, as in force in Maryland; but this is not conclusive, as the court of appeals of Maryland have declared several English statutes to be in force in Maryland which he omitted from his list.

This statute in terms applies to that part of Great Britain *called England*. But several statutes similarly limited have been declared in force in Maryland, by the court of appeals.

The Declaration of Rights of Maryland says "that the inhabitants of Maryland are entitled to the common law of England * * * and to the benefit of such of the English

statutes as existed at the time of their first emigration, and which, by experience, have been found applicable to their local and other circumstances, and of such others as have been since made in England or Great Britain, and have been introduced, used and practiced by the courts of law and equity."

Although this statute would be as conveniently applicable in Maryland as in England, it was not in force at the time of the first emigration, and there is no evidence that it has ever been used and practiced under in the courts.

And yet, as the court of appeals say, in *Sibley vs. Williams Execr.*, 3 G. & J., 52, "it has always been understood that the judges under the old (charter) government laid it down as a general rule that all statutes for the administration of justice, whether made before or after the charter, so far as they were applicable, should be adopted."

And as this would seem to be pre-eminently a statute for the administration of justice, there is good reason for holding it to be in force in Maryland and this District. But it does not become necessary to determine that question definitely now, because I shall rest my decision of this question on common law principles.

The contention is, in this case, that murder can only be tried and punished in the county where it is committed; that death is an essential element in the crime, and that, as the death did not occur within this District, the crime of *murder* was not committed here, but, at most, an assault with intent to kill. The same reasoning will apply to the place where the death occurred. The mortal wound being an essential element of the crime, and this not having been inflicted in the same jurisdiction where the death occurred, it follows that murder was not committed *there*. The consequence of this doctrine is that, although murder most foul may be committed, yet, if by accident, or even by contrivance of the assassin himself, the victim be conveyed, before his death, over the territorial boundary of the jurisdiction where he was smitten, it becomes impossible to *locate* the murder, and its perpetrator secures immunity from the punishment due to this heinous crime.

Tested by a common sense application of the principles of the common law, this position would hardly meet with favor anywhere, and few courts would be willing to assent to it unless constrained thereto by preponderant authority.

A wound, not immediately fatal, is inflicted in this District. Until its consequences are ascertained, it cannot be

determined whether the offense committed is a homicide or an attempt. But when death results from the wound, no matter where, it is ascertained that a homicide is committed. Everything of which the perpetrator was guilty was committed here. The crime consists in intentionally and unlawfully causing the death. Wherever the death may have occurred, it was *caused here*, by the fatal wound inflicted *here*. It is even a misnomer to speak of such an offense as having been begun here and completed elsewhere. There are offenses to which such language is applicable, as the case of forgery, where a part of the fabricated instrument is executed in each of several jurisdictions; or the case of conspiracy, where several conspirators reside and act in different jurisdictions. In all cases of this kind there is an active agency exercised by the offenders in the several jurisdictions, and something done in each to perfect the crime. But in the supposed case of murder, the offender's active agency is exhausted here. The laws of physical nature take up the work where he left off, and simply work out the consequences of his crime, and by them determine its grade. It is perfectly true that the *crime* of murder is not complete, in point of *time*, until death occurs. But it is a *non sequitur* that it is completed *where* death occurs. The event determines the crime, but does not necessarily *locate* it.

- + It is hardly correct to speak of the death as an element in the crime. It is a necessary condition to it, but the elements of the crime are, properly, the acts of the perpetrator, to wit: the malice, intent, and the blow. Apart from the wound, as already said, the death was not his act, but was the work of nature. The deed committed by him draws to it the consequence, as the principal does the incident, and common sense would dictate that if the crime must have a locality, in order to be punishable, its locality is where the assassin's acts were committed. The common law can be guilty of no greater absurdity than the doctrine that in the supposed case of a mortal wound and a consequent death, in different jurisdictions, the murder is an intangible abstraction, and the redress of the wrong is beyond the machinery of the law.

But, in fact, this doctrine never had in England the sanction of a judicial decision or any other countenance than extrajudicial opinions or *doubts*.

In 8 Coke's Institutes, 48, it is said, "If a man be stricken upon the high seas and dieth of the same stroke upon land, his cannot be inquired of by the common law because not

visne can come (*i. e.*, no jury can be summoned) from the place *where the stroke was given, because it is not within any of the counties of the realm.*"

The same thing, in substance, is stated in 1 Hawkins P. C. C., 18, pp. 11, 12, and 1 East's P. C., 365.

But what the law would be in opposite case, viz., where the stroke is given in the body of a county and the death occurs out of the realm—on the high seas or elsewhere—which would be substantially the present case, is not stated. The reasons assigned for the failure of jurisdiction would not apply to such a case, because a jury could be summoned from the county where the blow was struck, and, indeed, the silence of these commentators as to the supposed case, while excluding the opposite case from the cognizance of the common law, would justify the inference that it could be inquired of by the common law. Nor do I find a different opinion expressed as to this particular case anywhere. From a treatise on the admiralty jurisdiction, by Sir Matthew Hale, preserved among the Hargrave manuscripts in the British Museum, it seems to have been his opinion that in case of a stroke given in the narrow seas, followed by death on land, the trial should be at common law, "because (to use his language) otherwise there would be a failure of justice, which cannot be presumed in so long a continuance of time," and that "the death that is within the county shall, for necessity and to prevent a failure of justice, attract the trial of the whole offense to the common law." These reasons would certainly apply with equal force to the opposite case of a stroke on land followed by death without the realm. In this, as in the other, for necessity, and to prevent a failure of justice, the common law should take cognizance of the offense. The statute of 2 Geo. II, before referred to, expressly provides for both cases, simply reciting that it is enacted for preventing any failure of justice and for taking away all doubts touching the trial of murder in the cases mentioned; but whether such doubts existed, as to both classes, is not very clearly intimated.

The doubts which have been expressed relate more particularly to the case of felonious assaults in one county, resulting in death in another county, within the realm; and it must be admitted that the reasons urged against the jurisdiction in the county of the blow, apply equally where the death occurs abroad.

As to this, Coke says (3 Inst., 48), "And before the making of the Stat., 2 Edw. VI, if a man had been feloni-

only stricken or poisoned in one county and after had died in another county, no sufficient indictment could thereof have been taken in either of said counties, because, by the law of the realm, the jurors of one county could not inquire of that which was done in another county. It is provided in that act, that the indictment may be taken * * * in that county where the death doth happen."

The reason assigned by Coke could not now be deemed sufficient. The same author shows that the jurors of a county where a murder was committed might inquire into the guilt of accessories instigating it in another county. And when we remember that many offenses are committed in a given jurisdiction which are begun elsewhere, as in the case of libels sent into it for publication, nuisances begun outside and continued within, &c., it is seen that, in order to fix the responsibility on the offending party, jurors must necessarily inquire of all matters outside of their county that are pertinent to those within.

The idea in question probably grew out of the long since obsolete rule that jurors had to be summoned from the parish, vill or neighborhood of a crime, on account of their knowledge of the facts, of the parties, and witnesses. Indeed, they were summoned more as witnesses than as impartial judges, and this was a reason why they could not notice events which had transpired in other counties. The modern theory of the grand jury is the reverse of all this. It requires that body to be unbiassed and to inquire by the testimony of witnesses, and that inquiry has no territorial limit narrower than the exigencies of the case.

This reason is set out in the preamble of the statute 2 and 3 Edw. VI, to which Coke refers. That recites that "whereas it often happeneth and cometh in sundry counties of this realm, that a man feloniously stricken in one county, and after dieth in another county, in which case it hath not been founden by the laws or customs of this realm, that any sufficient indictment thereof can be taken in any of the said two counties; for that, by the custon of this realm, the jurors of the county where such party died of such stroke, can take no knowledge of such stroke, being in a foreign county, although the same two counties and places adjoin very near together. Nei the jurors of the county where the stroke was given, cannot take knowledge of the death in another county, although such death most apparently came of the same stroke. So that the King's Majesty, within his own realm, cannot, by any laws yet made or known, punish such mur-

therers or manquellors for offenses in this form committed and done ;” and then the statute proceeds to enact :

“That where a person feloniously stricken or poisoned in one county shall die of the same in another, an indictment thereof, found by the jurors of the county *where the death shall happen* * * * shall be as good and effectual as if the stroke or poisoning had been committed in that county.”

The statute does not prohibit an indictment in the county where the blow was given, but *authorizes* it where *the death occurs*.

The enacting part would simply justify the inference that an indictment could not previously have been had in the county where the death occurred, but would rather lead us also to infer otherwise as to the county where the blow was given.

The preamble, however, does recite that *it has not been found* that any sufficient indictment can be taken in either of the counties.

This preamble is not an enactment, nor is it a declaratory statute, intended to establish the meaning and interpretation of existing laws. It is simply a declaration of the reasons, which may be well or ill founded, for the enactment which follows. Still less is it a judicial exposition of the law.

Says Dwarris, in his work on Statutes, p. 503 :

“A preamble is not only not essential and often omitted, but it is, strictly speaking, *without force in a legislative sense*, being but a guide to, and not the vehicle of the import of the statute. (6 Mad., 62, 144.) And to what is it properly a guide ; to the meaning of the enactment? No ; but to the intentions of the framer, which is only the first stage on the road in the construction of statutes.”

Again, p. 506 :

“‘I use the preamble,’ says Wigram, V. C., in *Salkeld vs. Johnson*, 1 Hare, 207, ‘only for the purpose of ascertaining what the cases are to which the act was intended to apply.’ So, in *Fellows vs. Clery*, Patteson, J., said the preamble of an act may be legitimately used to ascertain and find the subject-matter to which the enacting part is to be applied, and even in some cases to control and cut down the enacting part. * * * Such is the whole extent of the influence of the title and preamble. Barrington has shown in his observations on the statutes, by many instances, that a statute frequently recites that which is not the real occasion of the

law, or states that doubts existed as to law, when, in fact, none were entertained. The most common recital for the introduction of any new regulation has been to set forth that doubts have arisen at the common law. Frequently these alleged doubts never existed at all, and such preambles are supposed, therefore, to have much weakened the force of the common law in several instances."

Sedgwick on Statute and Constitutional Law repeats the views of Dwarria.

As this preamble, then, has neither the force of legislation nor the weight of judicial decision, we need not feel hampered by it as authority, but are at liberty to inquire from other sources what was the common law on this subject.

Long after this date we find Sir Matthew Hale writing that "at common law, if a man had been stricken in one county, and died in another, *it was doubtful* whether he were indictable or triable in either, but the more common opinion was that he might be indicted *where the stroke was given*, for the death is but a consequent and might be found though in another county, 9 E. IV, 48 ; 7 H. VII, 8 ; and if the party died in another county, the body was removed into the county where the stroke was given for the coroner to take an inquest *super visum corporis*," &c.

Still later, we find Sergeant Hawkins (P. C., 8th ed., p. 94) writing, "*It is said by some that the death of one who died in one county of a wound given in another was not indictable at all, because the offense was not complete in either, and the jury could only inquire of what happened in their own county. But it hath been holden by others that if the corpse were carried into the county where the stroke was given the whole might be inquired of by a jury of the same county.*"

And nearly ninety years later still, viz., in 1806, East (Crown Law, v. 1, p. 361) writes :

"Where the stroke and death are in different counties, *it was doubtful* at common law whether the offender could be tried at all, the offense not being complete in either, though the more common opinion was that he might be indicted where the stroke was given, for that alone is the act of the party; and the death is but a consequence and might be found, though in another county, and the body was removed into the county where the stroke was given."

And Starkie, in 1828 (1 Crim. Plead., p. 4, note), says, that the difficulty of inquiring by the jury into the death in

another county was frequently avoided by carrying the dead body back into the county where the blow was struck, and there a jury might inquire both of the stroke and the death.

These extracts show that the supposed rule which excluded a grand jury of one county from inquiring into what had transpired in another was a mere technicality and of no force. It was evaded by a device which did not change the fact that the death had happened in another county, and yet allowed the jury to inquire into it ; and, in fact, it had been held in the reign of Henry VII, in a case in the Year Books, in 7 Hen. VII, 8, where no such device as the removal of the body was resorted to, that an indictment which laid the blow in Middlesex and the death in Essex was good, because the striking is the principal act, and they who can take notice of the principal can take notice of the death, as accessory, though in another county ; though it is true, however, that there was a dissenting opinion. Tremaille, J., said : "It seems that it is not material where he died, for the striking is the principal point, but it requires death, otherwise it is not felony ; but whether he died in one place or another is not material."

It is inconceivable that the formality of removing the body into the jurisdiction where the wound was inflicted would be considered *necessary* at this day to create jurisdiction there, but if it would be, it is sufficient to add that that condition is fulfilled in the present case, and the *corpus delicti*, without dispute, is proven here.

The extracts before mentioned, show, further, that as early as Sir Matthew Hale's day, the distinction was perceived between the constituents and the consequences of a crime, and we have his high authority that the *more common* opinion favored the jurisdiction in the county where the stroke was given, and he cites the case in the Year Books already mentioned.

Serjeant Hawkins also notes this as the opinion of some, and Mr. East as the more common opinion.

The case in the Year Books and the opinions of these eminent writers may, I think, be taken as more satisfactory evidence of the common law than the preamble of the Stat. 2 and 3, Edw. VI, and the commentary of Coke, which is evidently based upon it.

I have thus referred to the case of a wound inflicted in one county followed by death in another, because the reasons affecting jurisdiction in such case seemed applicable to

the case where these events were separated by the line of national jurisdiction.

In neither case, was there any decision in England against the jurisdiction in the county where the stroke was given, and in the case where the death occurred abroad, there do not seem to have been doubts expressed. It seems to me that in both cases the great authority of Sir Matthew Hale would have been cast in the scale in favor of the jurisdiction.

Later on, we find Chief Justice Abbot in the case of *Rex vs. Burdett*, an indictment for libel, decided in 1821, saying, in reference to the statute of 2 and 3 Edw. VI :

“It seems somewhat extraordinary that the preamble of this part of the statute should be expressed in the terms in which we find it, because Lord Hale mentions the point as being doubtful at common law, and says the more common opinion was that the party might be indicted where the stroke was given, and in the same page there is a reference to Cole’s case, Plowden, 401, to show that a general pardon whereby all misdemeanors are pardoned, intervening between the mortal stroke and the death of the party stricken, doth pardon the felony consequentially, because the act that is the offense is pardoned, though it be not a felony until the party die.”

And still later, in 1831, we have the case of *Rex vs. Hargrave*, 5 Car., and p. 170, a case of assault in the parish of All Saints, Poplar, in the county of Middlesex, followed by death in the county of Kent. The indictment and trial were in the county of Middlesex, where the fatal assault was made. An objection to the indictment was that it did not charge the offense at any particular place. Mr. Justice Patterson said:

“The giving of the blows which caused the death constitutes the felony. The languishing alone, which is not any part of the offense, is laid in Kent; the indictment states that the prisoners were then and there present, aiding and abetting in the commission of the said felony; that must of course apply to the parish of All Saints, Poplar, where the blows which constitute the felony were given, and the words *then* and *there* refer with sufficient certainty to that parish.”

The indictment in the county where the fatal assault was made was sustained. It must be very evident from these citations that the weight of authority in England is in favor of the jurisdiction at the place where the fatal injury is inflicted.

In this country the authorities are divided.

The earliest that has been brought to my attention is that of *U. S. vs. Bladen*, 1 Cr. C. C. R., 548. This was a case in the old circuit court of this District, sitting in Alexandria county, and of course administering the law of Virginia which was in force there. It appeared that the mortal blow had been given in Alexandria, and the death resulting from it took place in St. Mary's county, Md. There appears to have been little discussion of the question of jurisdiction, but the court were of opinion that the judgment must be for the prisoner, the offense not being complete within their jurisdiction.

The court refer for authority, to Coke's Institutes, which have already been considered, and to Heydon's Case, 4 Coke, 41, and *Horn vs. Ogle*, 4 Coke, 42.

I have found two cases in Coke's Reports, under the title of Heydon's Case, which are both civil actions, and throw no light upon the present question, and have been unable to find any case bearing the other title.

Subsequently, in 1821, the case of *Commonwealth vs. Linton*, 2 Virginia Cases, 205, was decided. In that case the deceased was wounded in Virginia and died in Ohio. In this, too, there was not only little or rather no discussion, but the Attorney-General admitted that the common law was, that where a man was stricken in England and died in a foreign country, or where a blow was given in one county and the person died in another, in the former case he could not be tried in England for murder (which seems to have been a gratuitous admission), nor in the latter, could he be tried in either county. He referred to Hawkins and Chitty only, and the court, without discussion, adopted his view.

In the case of *United States vs. Rolla*, reported unofficially in 2 American Law Journal, 138, which was tried in Washington in 1849, Judge Crawford adopted the same view; but here too, there does not seem to have been any discussion of the subject, and no authority is cited by the court. The judge probably followed the cases already referred to.

In two of the United States circuit courts, in the cases *U. S. vs. McGill*, 1 Wash Cir. Ct., 463, decided in 1806, and *U. S. vs. Armstrong*, 2 Curtis C. C., 446, it was held, in the same general way, that a murder on the high seas was not complete, so as to give the United States courts jurisdiction to try it, where the wound was given at sea, but the death occurred on land.

The case of *Stoughton vs. The State*, 13 Sm. & M., 255,

has been supposed to be adverse to the jurisdiction where the wound is inflicted, if the death occurs elsewhere, but it is not so. It turns entirely on the statute of Mississippi, and does not purport to settle the common law question. Judge Sharkey, referring to the statute of Edw. VI, says:

“Our statute was passed with the same object. It does not, it is true, say that the prisoner shall not be tried in the county where the stroke was given, and if it could be shown clearly that he was triable there by the common law, perhaps the statute might be regarded as giving additional power to try him in the county where the death happened, without interfering with the jurisdiction as at common law. But as the question was, to say the least, doubtful, at common law, the statute must be regarded as the only law on the subject.”

If the fact is of any value, it may be remarked, of all these cases, that they lack the feature present in this case, of the return of the body of the victim to the jurisdiction of the assault.

The question, as one at common law, arose in the case of *Riley vs. State*, 9 Humphreys, 656, in 1849.

It was objected for the defense that there was no evidence in the record that the death had happened in Henderson county, where he was indicted which was indispensable to give the court jurisdiction to try the prisoner.

The court, after referring to a statute of the State, passed in 1809, says:

“But that act provides that in all criminal cases the trial shall be had in the county where the offense may have been committed.” * * * “But it is insisted that this construction only restores the common law rule and involves the subject before us in all the uncertainty that existed before the statute of Edward, and, as a consequence, if the stroke be given in one county and the death happen in another the party can be indicted in neither. We do not think these consequences follow. In the first place, the statute of Edward was enacted to remove all doubts upon the subject, because different opinions, growing out of the refinements of that period of the common law, had been expressed. We find no decision in which it has been held that the murderer, in such case could be indicted in neither county. On the contrary, East says the common opinion was that he might be indicted where the stroke was given. That alone is the

act of the party. He commits this act and the death is only a consequence. Therefore, when the legislature enact that the party shall be tried in the county where the offense may have been committed, they intended *where the active agency of the perpetrator was employed*. We think, therefore, that the trial was properly had in the county of Henderson, where the stroke was given."

1875. In the case of *Minnesota vs. Gessert*, 21 Minn., 369, it appeared that the defendant was indicted for murder by feloniously stabbing the deceased in Washington county, in that State, from which he died in the county of Pierce, in Wisconsin. The indictment was demurred to, as showing a want of jurisdiction. Berry, Justice, on the question of jurisdiction, said: "It is for his acts that the defendant is responsible. They constitute his offense. The place where they are committed must be the place where his offense is committed, and therefore the place where he should be indicted and tried. In this instance, the acts with which the defendant is charged, to wit, the stabbing and wounding, were committed in Washington county. The death which ensued in Pierce county, though it went to characterize the acts committed in Washington county, was not an act of the defendant committed in Wisconsin, but the consequence of the acts committed in Washington county against the peace and dignity of the State of Minnesota. We are therefore of opinion that the demurrer should be overruled."

So, in *State vs. Bowen*, 16 Kansas, 476, it was objected that the information below was insufficient, because it omits to allege the death in the county where the indictment was found. Brewer, J., said, after reviewing the authorities:

"It seems to us, without pursuing the authorities farther, reasonable to hold that as the only act which the defendant does towards causing the death is in giving the fatal blow, the place where he does that is the place where he commits the crime, and that the subsequent wanderings of the injured party, uninfluenced by the defendant, do not give an ambulatory character to the crime; at least, that these movements do not, unless under express warrant of the statute, change the place of the offense, and that while it may be true that the crime is not completed until death, yet that the death simply determines the character of the crime committed in giving the blow and refers back and qualifies the blow."

The same thing has recently been decided in the State of Alabama in the case of *James D. Green vs. The State of*

Alabama, the report of which has not yet been published. The defendant was indicted for the murder of Ephraim Thompson, who was wounded in Colbert county, Alabama, and died from the wound in the State of Georgia.

Somerville, J., after considering the legislation on this class of cases, said :

“ But we need not rest the decision of this question on this particular construction of the statute. Our view is that the crime of murder consists in the infliction of a fatal wound, coupled with the requisite contemporaneous intent or design which legally renders it felonious. The subsequent death of the injured party is a result or sequence, rather than a constituent, elemental part of the crime. This principle, we think, is correct, at least so far as affects the question of jurisdiction.”

He then cites with approbation some of the cases before referred to by me, and adds :

“ We conclude, then, that the crime charged against the prisoner was, irrespective of the statute, one against the peace and dignity of the State of Alabama, and properly within the jurisdiction of the courts of this Commonwealth.”

These are all the cases that have been brought to my attention, of indictments in the county where the blow was struck, and in which the direct question of the common-law jurisdiction, in that county, was presented and decided.

The subject has been, however, incidentally discussed in another class of cases. A number of the States have followed the example of the United States, in providing, in their constitutions, that accused parties shall be entitled to trial in the county or district wherein the offense shall have been committed. At the same time, they have followed the Stat. 2 and 3 Edw. VI, by legislative enactments that, in cases of homicide, the trial of the accused shall take place in the county where the death occurred, where the mortal wound was inflicted elsewhere, whether within or without the State.

In several cases, founded on these statutes, their constitutionality was questioned, upon the ground that the place of the death was not the place where the crime was committed, in the contemplation of the constitutional provisions referred to.

Now, the court of last resort in a State feels a great reluctance to adjudge an act of its legislature to be void or repugnant to its constitution. The rule which governs them is laid down by Chief-Justice Marshall as the rule by which

the Supreme Court should be guided, in the case of *Fletcher vs. Peck*, 6 Cr., 87, viz.:

“The question whether a law be void for its repugnancy to the Constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced as having transcended its powers and its acts to be considered void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.”

In the case of the *State vs. Pauleg*, 12 Wis., 599, decided in 1860, the constitutionality of such a law was discussed, and the court, after referring to the doubts as to the common law and the ancient statute of Edw. VI, say, in substance, that the constitutional provision could not have been intended “to restore the doubts that existed at common law as to which was the county for trial,” but “the rule was either stated in this general form, upon the assumption that when it came to be applied to an exceptional case, where the offense was committed partly in two counties, it would be competent for the legislative power to provide that it might be prosecuted in one or in either of them, as being the only possible application which the rule could have; or, if it intended to fix imperatively one of the counties, in such a case, as the place of trial, the language employed can only be accounted for on the theory that it was assumed by the framers that, for the purposes of punishment, it had long been settled that the county where the death happened was to be deemed the one where the offense was committed.” In other words, the Constitution either meant to leave it to the legislature to provide for such a case, or they assumed the rule to have been long settled in favor of the county of the death. It is obvious that this is not a direct decision of the court on the common law question of jurisdiction. The court was composed of three judges, and the chief-justice dissented from the opinion, though on what grounds does not appear.

Another case is that of *Tyler vs. People*, 8 Mich., 320, decided in 1860 also.

The accused was indicted in Saint Clair County, Michigan, for manslaughter committed on one Henry Jones. It

appeared that the fatal wound was given on the river Saint Clair, within a county in Canada, and the death occurred in Saint Clair County, Michigan. The indictment was under a law providing that in case of wounding or poisoning out of, or within the State, by means whereof death should ensue in any county of the State, the offense may be prosecuted and punished in the county where the death may happen. The constitutionality of the statute was denied, not by counsel, but by one of the court. The majority of them held it valid, in the following language, viz.:

“The shooting itself, and the wound which was its immediate consequence, did not constitute the offense of which the prisoner is convicted. Had death not ensued, he would have been guilty of an assault and battery, not murder, and would have been criminally accountable to the laws of Canada only. But the consequences of the shooting were not confined to Canada; they followed Jones into Michigan, where they continued to operate until the crime was consummated in his death. If such a killing did not by the common law constitute murder in Michigan, we think it the clear intent of the statute to make it such, to the same extent as if the wounding and the death had both occurred in the State.”

This is the whole of it, and it amounts to no more than this, viz., that the legislature meant to make a death in the State, unlawfully caused anywhere, murder in the place where the death occurs. It does not touch the common law question of jurisdiction.

But Justice Campbell dissented in a very able opinion, in which he maintained that, inasmuch as the statute merely prescribes the place of prosecution and punishment, but prescribes no punishment, it is necessary to look elsewhere for the punishment; that whether the offense described shall be punished as murder depends on the question whether it is murder at common law, and independently of the statute. He then maintains that murder, as an offense against the Crown, required that both slayer and slain should be under the King's peace and owe him allegiance, and that the term cannot apply to a homicide committed out of the realm by one foreigner upon another, which was virtually this case. He then further combats the idea that the place of death is the place of the offense, and, referring to the statutes of 6 Edward, says:

“This statute originated the practice of indicting at the place of death, and an idea has hence sometimes gained currency that the place of death was the place of the offense,

an idea which the language used is not at all calculated to convey, and which is inconsistent with various rules to which I shall refer, in addition to that that has already been mentioned."

And, further on, he adds:

"The doctrine of constructive presence has no applicability to such a case as this. All that it amounts to is, that the crime shall be regarded as committed where the injurious act is done. A *wounding* must of course be done *where there is a person wounded*, and the *criminal act is the force against his person*. That is, the immediate act of the assailant, whether he strikes with a sword or shoots a gun, and he may very reasonably be held present where his forcible act becomes operative. And the suffering which the wounded man subsequently undergoes is not an act, but a mere consequence; a distinction which is real and essential, and cannot be disregarded. * * * There is but one guilty act, which consists of the blow or wounding, inflicted with malicious intent, and the suffering and death are both merely effects of that one act."

He cites, with approval, the passages in Hale and East referred to by me. He is arguing that a murder is not committed at the place of the death, when that is a different county or State from that of the wound, and incidentally maintains the opposite proposition, that its locality is the place where the guilty act is performed.

The case of *Commonwealth vs. Macloon et al.*, 101 Mass., 1, was that of an indictment in Suffolk county in Massachusetts, for having inflicted wounds on the high seas on one Hooper, from which he subsequently died in said Suffolk county. The indictment was under a statute of February, 1790, providing for prosecuting and punishing, in such case in the county where the death happens.

The report of this case does not show distinctly that the constitutionality of this law was brought in question by counsel, but that would seem to be indicated by the tenor of the argument used by the court.

The declaration of rights, in the constitution of the State, says (Art. 13) that in criminal prosecutions "the verification of facts in the vicinity where they happen is one of the greatest securities of the life, liberty and property of the citizen," and the conclusion reached by the court (p. 16) is, that a law which has been kept on the statute book for such a length of time by repeated enactments is not to be lightly declared invalid for exceeding the legislative power.

Mr. Justice Gray delivered the opinion of the court, sustaining the validity of the law in question, with great learning and ingenuity. A considerable part of his argument is founded upon the supposed analogies furnished by cases in which a crime done in one county or State is held to be continued or perpetuated in another. He cites, for illustration, the case of bringing stolen goods from one county into another, in which it has been held, from an early period, that the unlawful carrying in the second county is deemed a continuance of the unlawful taking, so that all the elements of larceny exist in the second; also, the case of a nuisance erected in a river or stream in one county in which case the party offending is liable civilly and criminally in any other county where it injures another's land; also, the case of a libel published in one State, in a newspaper which circulates in another, in which case the offender may be indicted in the latter. And he argues that in like manner the mortal blow continues in operation wherever the victim is carried, and the crime is perpetuated there.

This train of reasoning is sufficient for the purpose of the learned judge, to wit, to vindicate the validity of a law punishing at the place of the death, but it does not affect the question now under discussion. The illustrations referred to were of cases in which the offense was complete in the county where it was begun, as in the case of larceny, libel or nuisance, and might be punished there, but the argument is, simply, that they are repeated or continued elsewhere and might be punished there also. But this does not militate against the jurisdiction of the original county or State; it simply asserts an additional jurisdiction. It does not affect the present question. It leaves untouched the question of jurisdiction in the State or county where the mortal blow is inflicted. It simply asserts that that blow is virtually repeated and continued wherever the victim goes to die from its effects.

Other illustrations are given of death caused by a man who is absent from the place, as where one lets loose a dangerous beast which runs a great distance and kills a child; where one shoots from another jurisdiction and kills; where one procures poison to be administered by an innocent agent to a third person; and the general conclusion is that where one unlawfully sets the means of death in motion, he is the guilty cause of death at the time and place at which his unlawful act produced its fatal result. But in these cases, referred to for illustration, it will be observed that the offending party has injured no one at the place where he is;

his wrong is first done where his victim suffers. It is not a case of a crime begun in one place and completed in another; it is wholly done where it takes effect. The man is shot in the jurisdiction where the bullet strikes him; the child is killed *where* he is run over; the murder by poison is effected where it is taken, and no injury is done in any other than the places named. In the present case, the whole injury is done in the place of the shooting and the effects only are developed elsewhere. It is by the course of reasoning mentioned, that the validity of a statute providing for punishment at the place of death is maintained. And this is all that was necessary for the decision of that case. But the learned judge was confronted with the argument of Mr. Justice Campbell, in his dissenting opinion in the case of *Tyler vs. The People*, 8 Michigan, and, while controverting his opinion that the trial cannot be had at the place of the death, does express dissent, though it seems to me not very strongly, (nor was it necessary), from so much of Judge Campbell's opinion as favored a jurisdiction at the place of the wounding.

I have said, at the outset, that the analogy may not be complete between the law of time and that of place, in reference to this crime, and that while in point of time the murder may not be complete *until* the death, it does not follow that it is to be deemed completed *at the place* of the death.

As far as the rulings of the courts, as to time, supply us with an analogy, they fix the stroke as the essence of the crime.

Thus, in an indictment of aiders and abettors, where the stroke and death are laid on different days, the abetment had to be laid to the *stroke* and not to the death. (1 East P. C., 351.)

In Cole's case, Plowden, 401, Cole was indicted for the murder of Elizabeth Pembroke, who was wounded on the 12th of February and died on the 18th of June. He pleaded an intermediate pardon, by act of parliament, of all felonies, offenses, injuries, misdemeanors, &c. It was debated whether the pardon discharged him or not, inasmuch as the offense of the prisoner was not felony until the death, and the act could not pardon an offense not committed. But the justices agreed that the pardon discharged him, because the wound given by the prisoner was the cause of the felony, the giving of which wound was an offense and misdemeanor against the Queen, and that being pardoned by the act, and by that

all the consequences that followed from said offense are also pardoned.

So, also, the relation of the forfeiture or escheat of lands for treason or felony on the question of avoiding mesne incumbrances, is to the time of committing the offense. (1 Hall P. C., 260.)

Dame Hale's case, Plowden, 253, Ventris, 371, &c. These authorities are referred to in some of the cases already cited.

A similar point was ruled in California, in the case of *People vs. Gill*, 6 Cal. R. Between the fatal blow proved in that case and the death, a statute was passed, requiring crimes, previously committed, to be tried according to the law in force when they were committed. It was held that the death must be referred back to the stroke, so as to make that the date of the commission of the offense.

It is thus seen, that the weight of English authority is decidedly in favor of the jurisdiction in the place where the blow was struck, and that in this country there is a strong array of authorities looking in the same direction.

In this condition of affairs, I feel at liberty to adopt and announce the opinion which seems most to conform to common sense, and that is that the jurisdiction is complete where the fatal wound was inflicted.

As it follows from these authorities that the averment of the place of death is immaterial, it becomes unnecessary and improper to grant the thirteenth instruction, because the offense charged may be tried and a conviction might follow under those counts in the indictment which aver the death to have occurred in the District of Columbia, and for the reasons that I have already assigned, the fourteenth instruction asked, relating to jurisdiction, will have to be denied!

When Costs of Service and Fees of Witnesses for the Defence in Criminal Trials shall be at the Expense of the Government.

RULING OF MR. JUSTICE COX ON THIS QUESTION, IN THE CASE OF
THE UNITED STATES v. GUILTEAU.

Section 839 R. S. D. C. providing that "In all criminal trials the Supreme Court, or the Judge trying the case, may allow such number of witnesses on behalf of the defendant as may appear necessary, the fees thereof, with the costs of service, to be paid in the same manner as Government witnesses are paid," is not in conflict with the Act of 1846, and it is also doubtful whether the latter act is in force in this District.

An application is made to the court to pass an order allowing fees to witnesses residing at a distance of more than one hundred miles from Washington, who are to be summoned for the defense, together with the costs of service. It is made under section No. 839 of the Revised Statutes of the District, which is in these words, viz.:

"In all criminal trials the Supreme Court, or the judge trying the case, may allow such number of witnesses on behalf of the defendant as may appear necessary, the fees thereof, with the costs of service, to be paid in the same manner as Government witnesses are paid."

This court, as I learn from my brethren and the older practitioners at this bar, has repeatedly exercised the power which is now invoked, and which seems to be clearly conveyed by the general and comprehensive terms of the statute. The doubt which I have felt on the subject grew out of the ruling of the Supreme Court in the case of *Page vs. Burnstine*, 12 Otto. By an act of 1864 (June 22) parties to suits in the courts of this District were rendered competent to testify upon the trial of their own cases (with exceptions not material to this question). By an act of 1865, applying to the courts of the United States generally, and not to the District, this privilege was denied where one of the parties should be an executor or administrator as to any transaction with or statement by the deceased, &c. On the 21st of February, 1871, the act was passed establishing a government for the District of Columbia, containing this section, viz.:

"The Constitution and all laws of the United States,

which are not locally inapplicable, shall have the same force and effect within the District as elsewhere within the United States."

In the case of *Page vs. Burnstine*, the Supreme Court held that the effect of the last mentioned enactment was to make the act of 1865, before mentioned, a part of the law of the District. The doubt which this case suggested to me was, whether this same provision of 1871, did not put in force in this District an act of 1846, applying to the United States courts outside of the District, providing that, "whenever any person indicted in a court of the United States makes affidavit setting forth that there are witnesses whose evidence is material to his defense; that he cannot safely go to trial without them; what he expects to prove by each of them; that they are within the district in which the court is held or within one hundred miles of the place of trial, &c., &c., &c., * * * in such case the costs incurred by the process and the fees of witnesses shall be paid in the same manner that similar costs and fees are paid in case of witnesses subpoenaed in behalf of the United States;" and whether this law, conferring the power in question only as to witnesses who are within a hundred miles of the place of trial, did not, by implication, repeal the larger power conferred on the courts of this District. I think, however, that I can perceive differences between the question determined in the case cited and the present one. The restriction upon the party's privilege of testifying created by the act of 1865, when made a part of the law of this District, being inconsistent with the unqualified privilege which before prevailed, necessarily operated a repeal, *pro tanto*, of the existing law. On the other hand, there is no necessary inconsistency between the act of 1846 in the general statutes and the act of 1867, passed for the District of Columbia, in reference of defendant's witnesses. The act of 1846 is not a restrictive but an enabling act, and so is the other. Two acts conferring at different times different degrees of authority, although the more limited one be later in time, are not necessarily conflicting. They are not so in terms. If they are, it must be because of implication from the narrower act that the larger was designed to be modified. This implication is not a necessary one, and whether it is a proper one in a particular case must depend upon its circumstances. If the act of 1846 had been enacted anew, singly and especially for the District, inasmuch as the court of the District already possessed a larger power, it would be a natural suggestion that

such an act would be unnecessary, unless it was intended, by implication, to curtail the powers already conferred. But when it is borne in mind that the act of 1871 was a sweeping clause, embracing all possible subjects, and there is no reason to suppose that any special attention was given to this particular subject, there is not the same reason for holding that the one act was intended to repeal the other, or that the existing powers of this court were intended to be curtailed. And there is a reason why the two acts may consist together and operate concurrently, viz., that they provide different relief for different contingencies. In the case of witnesses within a hundred miles, the court is not, in terms, clothed with discretion as to the number of witnesses for the defense who are to be paid. The court, on the showing made, may order payment for the witnesses. This may, perhaps, be held obligatory; or, if not, the court has simply to order or refuse. But under the general power, conferred without limit as to distance by the act of 1867, the court is to fix the number of witnesses to be allowed for the defense and paid by the United States. I do not think, therefore, that the two acts are inconsistent, if both are considered in force here. But it may be doubted whether the act of 1846 is to be considered as locally applicable here. The term district, within which the witnesses must be, means undoubtedly the judicial district of the Federal judiciary system, whereas the District of Columbia is not a judicial district of that system. It is unnecessary, however, to discuss the subject more at length. I will consider at chambers what and how many witnesses ought to be allowed for the defense at the expense of the Government.

Jurisdiction of the Criminal and Police Courts of the District of Columbia—Prosecutions by Information and Indictment.

OPINION OF MR. JUSTICE COX SUSTAINING THE MOTION TO RESCIND THE ORDER GIVING LEAVE TO FILE THE INFORMATION IN THE CASE OF THE UNITED STATES V. THOMAS J. BRADY ET AL., DELIVERED IN THE CRIMINAL COURT NOVEMBER 10, 1881.

1. Infamous crimes and misdemeanors are, in the meaning of Section 1049 of the Revised Statutes of the District of Columbia, such offences as are punishable with imprisonment in the penitentiary. Crimes and misdemeanors not infamous cannot be so punished.
2. A prosecution of an infamous crime or misdemeanor cannot, in the District of Columbia, be instituted by information. It must be by indictment in the Criminal Court.
3. The Police Court of the District of Columbia has original and exclusive jurisdiction of all non-infamous crimes and misdemeanors and they can only be tried in the Criminal Court on appeal.

STATEMENT.

On the 30th September, 1881, the District Attorney, by leave of court first obtained, filed an information in the criminal side of the Supreme Court of the District against Thomas J. Brady and others, charging a conspiracy to defraud the United States. The information was based upon the affidavits of Thomas L. James, Postmaster General, and P. H. Woodward. Bench warrants were thereupon issued against the defendants, who being brought into court, entered recognizances for their appearance. Counsel for the defense thereupon filed a motion to rescind the order giving leave to file the information, and the hearing of the motion having been set for the 3rd of November, was argued by Messrs. Bliss, Brewster and Cook for the Government, and Messrs. Wilson, Ingersoll, Chandler and Totten for the defendants. The argument lasted six days, and displayed in the language of the court, "a breadth of view, a depth of research, and a force of reasoning on both sides never before surpassed in this court." The opinion of the court sustaining the motion and rescinding the leave given to file the information was as follows:

This case has been heard upon a motion to rescind the order permitting the information to be filed. The reasons assigned for the motion are such as, it is insisted, would have

prevailed against the application for leave to file, in the first instance, had the defendants been offered an opportunity to resist it. I have listened with vast pleasure and profit to the discussion of this motion. Questions of deep interest have been treated with a breadth of view, a depth of research and a force of reasoning, on both sides, never before surpassed in this court. I should be glad indeed to do justice to this discussion in the only way in which it can fitly be done; that is, by a careful review of all the positions maintained and combatted. But this is a task which would require much time and labor, whereas the view which I take of the case dispenses me from the labor, and other considerations debar me from the pleasure of exploring the wide field covered by this brilliant debate. The reasons which must control my judgment in determining this motion lie within a narrow compass.

I have no doubt that an information, although in the remote past it was used as an instrument of oppression, would, if authorised by Congress, be a constitutional and lawful proceeding for the prosecution of offenses of the grade of misdemeanor and not infamous; and the practice and precedents in the Federal courts seem to me to favor such a proceeding as legal, without express enactment authorizing it in cases directly affecting the public service; and such an information in the Federal courts corresponds, in my judgment, to that class of informations which the attorney-general in England, would file *sua sponte*, and would be filed in this country by the district attorney. Of course the Fourth Amendment to the Constitution imposes the salutary restriction that no warrant shall issue except upon probable cause supported by oath or affirmation.

I am also well satisfied that the question whether an offense is infamous was determined at common law by the character of the offense, and not by the punishment affixed to it. And I do not think that at common law a conspiracy was an infamous offense, unless its object was to obstruct or corrupt the course of public justice. We have nothing to do, of course, with the popular sense of the term "infamous," but only with its technical sense, as determined by the decisions of the courts or the enactment of statutes. But whatever views I might entertain on these subjects must be controlled by the local legislation of Congress; and I feel compelled to avoid the seductive field of speculation for the narrower task of interpreting the laws which Congress has enacted for our guidance here.

The fifth article of the Amendments to the Constitution provides that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment by a grand jury; except in cases arising in the land and naval forces, etc. Section 1040 of the Revised Statutes of the District of Columbia declares that the police court shall have original and exclusive jurisdiction of all offenses against the United States committed in the District, not deemed capital or otherwise infamous crimes; that is to say, of all simple assaults and batteries and all other misdemeanors not punishable by imprisonment in the penitentiary. These two enactments, constitutional and legislative, embrace all the offenses against the United States that can be committed within the District of Columbia, and group them into two classes, viz.: Those which are capital and otherwise infamous and those which are not capital or otherwise infamous. The offense charged in this information must be in one category or the other. It is not capital, and it is a misdemeanor, but it must be either infamous or not infamous. If the former, the Constitution requires it to be tried on a presentment or indictment of a grand jury. If the latter, the police court has original and exclusive cognizance of it, and it can only be tried here upon an appeal from that court. The effect, therefore, of establishing that this is not an infamous offense, is to throw it into the police court for trial in the first instance.

It has been suggested, as I understand, that the act establishing the police court has been amended so as to cut off the exclusive jurisdiction, by acts of February, 1877, and June 22, 1874. (See Richardson's Supplement, pages 279 and 85.) The latter gives the Criminal Court jurisdiction of all crimes and misdemeanors committed in said District, not lawfully triable in any other court, and which are required by law to be prosecuted by indictment or information. The other amends section 763 of the District Revised Statutes, by giving the courts of the District cognizance of all crimes and offences committed within the District. I do not so understand it. The Circuit Court of the District of Columbia, created by act of February 27, 1801, was invested with jurisdiction to try all crimes and offenses committed within said District, and all cases in equity between parties, both or either of which should be resident, or be found within the District of Columbia, etc., and said court and the judges thereof were to have all the powers by law vested in the circuit courts and the judges of circuit courts of the

United States, and by subsequent legislation the Supreme Court of the District succeeded to those powers and this jurisdiction. But in the revision of 1874, by a singular oversight, the Supreme Court of the District was given only the same powers and jurisdiction that the circuit courts of the United States possessed. This limited the jurisdiction to those special cases, criminal and civil, that belonged to the judicial power of the United States, and the Supreme Court of the District and the criminal court were thus shorn of all their local jurisdiction and the most important part of their powers. Now, it was intended in the act of 1877, simply to correct this error and to place the courts where they were before the revision, and not to disturb the distribution of power and jurisdiction among them as it then existed. There is nothing in the act inconsistent, as I conceive, with the legislation of that period. The object of the act of June 22, 1874, I do not understand. But as it gives to the criminal court jurisdiction only of such offenses as are not triable in other courts, I do not perceive how it can be said to interfere with the police court.

It will very justly strike a stranger that legislation which leaves an offense of the gravity of this to be tried by a court created only for the summary trial of petty offenses against peace and good order is anomalous. And the inquiry is naturally suggested, how, by the same legislation, the offense is classified with respect to the distinction between the infamous and non-infamous crimes. It has been correctly said that the Constitution of the United States employs language for the meaning of which we are compelled to resort to the common law. The writ of *habeas corpus*, trial by jury, bills of attainder, *ex post facto* laws, due process of law, capital and infamous crimes, are all subjects provided for in the Constitution, but of which it contains no definitions, and the only conception we have of them is derived from the common law standards. When the Constitution provides that no person shall be held to answer for a capital or otherwise infamous crime, unless upon a presentment or indictment of a grand jury, we look to the common law for definitions of the terms capital and infamous, as well as for an understanding of the proceeding by which the offender is to be brought to justice. From that source we learn that a capital offense is any offense, no matter what, to which the death penalty was attached, and that an infamous offense was any to which it was an incident that a conviction of the offense entailed certain personal disabilities,

and principally a disqualification to testify as a witness in a court of justice, and that the incident applied to all felonies and some misdemeanors ; that these terms did not, however, denote any particular crime, but only indicated classes of offenses to which, at any time, by law, the penalties and disabilities in question might be attached.

But it cannot be successfully maintained that the constitutional amendment in question had special reference to the particular crimes which theretofore had been known at common law as capital and infamous, and intended to limit its safeguards to those offenses. It unquestionably was intended for all offenses which might thereafter be made capital or infamous by the legislation of Congress. This amendment referred to crimes against the United States when prosecuted in the federal courts. But there was no common law of the United States, and consequently there was no common law crime against the United States. There could be no one except such as Congress might declare and create by law. The whole Federal criminal code was then a thing of the future, and this was the subject contemplated in this Amendment. Congress, in establishing a criminal code, could undoubtedly make an offense capital which was not so before, and in such case could there be a doubt of the right of the accused to invoke the constitutional guaranty ? And if Congress should choose to reduce an offense before known as capital to a misdemeanor, free from the taint of infamy, could there be a doubt of its exclusion from the operation of this guaranty ? Or could there be a question of the right of Congress to declare infamous an offense not before so characterized ? Clearly not, as it seems to me.

Bearing this in mind, let us briefly examine such of the legislation of Congress as may bear on this subject. In 1834, Congress enacted that whenever any criminal convicted of any offense against the United States shall be imprisoned in pursuance of such conviction or of the sentence thereupon, in the prison or penitentiary of any State or Territory, such criminal shall, in all respects, be subject to the same discipline and treatment as convicts sentenced by the courts of the State or Territory in which such prison or penitentiary is situated, etc. On March 3, 1865, a law was passed providing that "in every case where any person convicted of any offense against the United States shall be sentenced to imprisonment for a period longer than one year it shall be lawful for the court by which the sentence is passed, to order the same to be executed in any State prison

or penitentiary, within the District or State where such court is held, the use of which prison or penitentiary is allowed by the legislature of such State for such purposes," and this enactment is reproduced in section 5541 of the Revised Statutes, except that the words "State jail" are substituted for the words "State prison."

The present information is founded upon section 5440 of the Revised Statutes, a reproduction of an act of March 2, 1867, which punishes the crime described in the information with a penalty of not less than \$1,000 and not more than \$10,000, and imprisonment not more than ten years. An amendment has since been made of the section which does not affect the present question.

It may be punished, then, with imprisonment for more than one year, and the application of the before-mentioned legislation to such a case was considered by the Supreme Court in the case of *Ex Parte Karstendict*, 3 Otto, 396. Karstendict was convicted of the identical offense charged against these defendants, in the Circuit Court of the United States for the District of Louisiana, and sentenced to sixteen months' imprisonment in the penitentiary at Moundsville, in the State of Western Virginia. He applied to the Supreme Court of the United States for a *habeas corpus*, and one of the questions raised was whether he could be sent to a penitentiary at all. The court holds that "the language of statutes is certainly sufficient to authorize imprisonment in a penitentiary at the discretion of the court, in all cases where the sentence is for a longer term than one year;" that in cases where the statute makes hard labor a part of the punishment it is imperative upon the court to include that in its sentence; but where the statute requires imprisonment alone, the several provisions before referred to place it within the power of the court, at its discretion, to order execution of its sentence at a place where labor is exacted as a part of the discipline and treatment of the institution, or not, as it pleases. Thus, a wider range of punishment is given, and the courts are left at liberty to graduate their sentences so as to meet the ever-varying circumstances of the cases which come before them. If the offense is flagrant, the penitentiary, with its discipline may be called into requisition, but if slight, a corresponding punishment may be inflicted within the general range of the law." It is, therefore, quite apparent that the offense described in this information *may* be punished, or in other words, is punishable, in the penitentiary.

While the legislation thus referred to was in force, Congress, on the 17th of June, 1870, passed an act establishing the Police Court of the District of Columbia, which is reproduced in sections 1041 to 1080 of the Revised Statutes of the District of Columbia. Section 1049 has already been referred to. It gives to the police court exclusive jurisdiction of all offenses not deemed capital or otherwise infamous, without exception. It impliedly excludes from its jurisdiction only offenses deemed capital or otherwise infamous. If the law had stopped here we would be referred to the common law to ascertain the jurisdiction of this court. But Congress did not choose to leave the matter thus vague and indefinite, and proceeded to indicate what, in its judgment, were misdemeanors not to be deemed infamous in this language, to wit: "That is to say, of all simple assaults and batteries and all other misdemeanors not punishable by imprisonment in the penitentiary." The language is not used by way of illustration merely, as if Congress meant to hazard the opinion that misdemeanors dispunishable in the penitentiary were deemed by the courts non-infamous crimes, but it is the very enacting clause of the statute, and it can have no significance except as an enactment that for the future these offenses shall be deemed non-infamous.

Thus, all non-infamous misdemeanors are made punishable in the police court, and they are declared to be such as are non-punishable in the penitentiary. Under this law can there be a non-infamous misdemeanor which may be punished in the penitentiary? Not if the law is to be obeyed, for by its very terms, all non-infamous misdemeanors are to be tried in the police court, and yet none can be tried there except those which are not punishable, viz., cannot be punished, in the penitentiary. As clearly as language can effect it, this law draws the line between non-infamous misdemeanors and other offences at the wall of the penitentiary. It does not in terms declare all others which are amenable to penitentiary discipline to be infamous, but since there are but two classes of crimes with reference to this question, and every offense known must belong to one or the other, to determine the limits of one class *expressly* is to fix those of the other *by necessary implication*. If anything is to be gathered, then, from this legislation that will determine the character of the offence now charged, the fact that it may be punished by imprisonment in a penitentiary would seem to place it in the category of infamous crimes.

I have said that at criminal law the punishment attached to an offense did not determine its character as infamous or not. We know, however, from history, how a course of legislation may establish a relation between the penalty and the grade of an offense. Felonies at criminal law, were those crimes which occasioned forfeiture of lands and goods. Capital punishment did not determine their grade. By a series of statutes many new felonies were created from time to time with the death penalty attached, until that became so associated with the idea of felony that whenever judgment of life or member was affixed by statute, the offense was deemed felonious, though not so termed in law. In some of the States of this country the crimes known at common law as felonies are so generally visited with penitentiary imprisonment that the penalty is regarded as determining the grade of the offense, and as distinguishing the felony from misdemeanor. It is not then to be wondered at that legislation should classify offenses with reference to the question of infamy, according to the punishment prescribed for them, and as I learn from the closing argument in this case, this is the rule in the statutory law of a number of States. That such was the object of Congress in the act establishing our police court has impressed itself in our court, sitting in General Term on two occasions. In the case of the *United States vs. Cross*, 1 Mac Arthur, 149, the view taken by the court was that inasmuch as petit larceny was punishable under the statute by imprisonment in the jail of the District for not longer than six months, and, therefore, not by imprisonment in the penitentiary, and the act establishing the police court had given it jurisdiction of offenses not infamous, *i. e.*, of misdemeanors not punishable in the penitentiary, the offense of petit larceny was virtually reduced from an infamous felony to a non-infamous misdemeanor, and the power of Congress to do this was asserted as one that could not be questioned. And in the case of *United States vs. Buell*, *ibid*, 502, which was a prosecution for libel, three of the judges held the offense to be an infamous one, two of them on the ground that it might be punished by imprisonment for more than a year, and, therefore, in the penitentiary, which placed it outside of the jurisdiction of the police court and in the category of infamous crimes which could only be tried upon presentment or indictment.

It seems to me, therefore, that the effect of the legislation we have been considering is to classify the offense here

charged among the infamous crimes, and thereby to secure the defendants from prosecutions for it, except on indictment.

If that be so, of course the information never could have been rightfully filed. Leave ought to have been refused, and the order giving leave must necessarily be rescinded. If an information could have been filed at all it would be proper for the court to examine the oath accompanying it, to see whether probable cause is shown and whether it is in such form as to justify any officer in issuing warrants for the personal arrest of the accused parties. I conceive it to be not only not necessary, but of doubtful propriety, that I should determine anything with reference to the oath in the present case. The information in this case has been assailed on various grounds affecting its merits. It is claimed that it does not set forth an indictable offense, because the facts alleged were within the official discretion of the principal defendant, and the only allowable criminal proceeding against him was an impeachment; and, also, because the only fraud which he could criminally conspire to commit would be one which is by statute made criminal; and, again, it is claimed that the information is contradictory and the crime alleged impossible. How far a court might inquire into the sufficiency of an information, on an application for leave to file it, is probably not very well settled. If it be perfectly apparent to the court, on inspection that no punishable offense is charged, it would probably be the duty of the court to refuse to allow warrants for arrest to issue.

If, on the other hand, a wrong has been perpetrated according to the showing of the information, but debatable questions present themselves as to the remedy, such as have been discussed here, it would, in my judgment, be proper to reserve them for a demurrer or motion in arrest. But in the light of what has already been said, any discussion of these questions by me would be gratuitous, and nothing remains for me but to grant the motion made on the part of the defendants, and to order their discharge.

INDEX.

ACCESSORY. See *Accomplice*, 3; *Murder*, 4.

ACCOMPLICE.

1. The word accomplice signifies in law a "guilty associate in crime." *United States v. Neverson*, 152.
2. Whether a witness is an accomplice in the crime charged in the indictment, or only an innocent witness of the transaction, is a question to be decided by the jury from the evidence in the case. *Id.*
3. If a party was present at a murder, but took no part in it, nor endeavored to prevent it, nor apprehended the murderers, but otherwise was not concerned in its commission, and was not aiding and abetting at the murder, nor ready to afford assistance if necessary, such presence will not of itself render him either principal or accessory to the murder, nor an accomplice therein. *Id.*
4. Such a person, if believed by the jury to have been merely an innocent witness of the transaction, stands before them like any other witness who chanced to have seen a crime committed. *Id.*
5. The degree of credit to be given an accomplice is a matter exclusively within the province of the jury; they may, if they see fit, act upon his evidence, even in a capital case, without any confirmation of his statements; but the court will advise that they should not convict upon his testimony alone and without corroboration. *Id.*
6. Such corroboration need not extend to the whole testimony of witness (since if this were so it would not be necessary to call him at all), but must relate to some portion of his testimony which is material to the issue of the prisoner's guilt. But proof that he told the truth in relation to irrelevant and immaterial matters, which were generally known, would not in itself be sufficient corroboration, nor that he told the truth in stating that the deceased was knocked down and killed (that fact being generally known). The corroboration should be of such and so many parts of the narrative of the accomplice as may reasonably satisfy the jury that he is telling the truth without restricting the confirmation to any particular points, the effect of such confirmation being for the consideration of the jury. *Id.*
7. Where there are several defendants and an accomplice testifies to their several acts, testimony corroborating him as to one or two of the defendants, is not necessarily corroborative as to the others. *Id.*
8. Testimony of an accomplice—the ruling on this subject in *United States v. Neverson*, considered. *United States v. Bicksler*, 341.

ACCOUNTS. See *Equity Pleading and Practice*, 3; *Payment*.

ADMIRALTY.

1. Payment of freight cannot be exacted of the consignee until there has been such a discharge of the cargo as to enable him to ascertain whether the goods correspond with those ordered. *Barker Bros. v. Schooner Wright*, 24.

ADMIRALTY (*continued*).

2. This rule will not be modified because the cargo consists of ice, and consequently liable to diminish by melting when exposed upon the wharf to the heat of the sun. *Id.*
3. There is nothing in the delivery of the goods upon the wharf before payment of freight at all inconsistent with the retention by the master of his lien for the freight. *Id.*
4. The master has a right to demand payment of the freight before the goods are taken from the wharf, if such removal interfere with the reasonable enforcement of his lien, and, if the cargo be too large to be landed in one day, he may require a *pro rata* payment as regards value before the portion first landed can be taken away. *Id.*
5. As a consignee is under no obligation to receive or pay for goods differing in character from those which he contracted to buy, there can be no duty devolving upon him to pay freight for the carriage of such goods. *Id.*
6. A consignee of a cargo of ice cannot refuse to pay freight for the entire cargo as originally shipped, because part of it has been diminished by melting. For any unusual loss or diminution he might have a remedy against the underwriter; but since the cargo is at the risk of the consignee from the time of its shipment and the mailing of the bill of lading, he is liable to pay the freight on the entire amount shipped; his right to inspect the goods is for the purpose of ascertaining whether they are of the *character* and *description* ordered. *Id.*
7. The consignees of a cargo of ice, which arrived in Washington, D. C., in the middle of July, wishing to inspect the cargo before paying the freight, proposed to the master of the vessel that if he would proceed with the delivery of the goods, they would pay the freight *pari passu*; or, if he preferred it, that the cargo on being landed should be stored in a convenient ice warehouse, belonging to the consignees, on the wharf. The master refused to do either, but demanded payment of the freight in full before the cargo was discharged. This the consignees refused, and in consequence of the disagreement the ice melted away in the hold of the vessel. *Held*, That neither of the propositions submitted to the master would, if accepted, have imperiled his lien for freight, and he was liable to the consignees for so much of the cargo as was lost. *Id.*
8. *Semble*, That a provision in a charter party, that the cargo shall be discharged by the consignee with the assistance of the crew, so far from giving a stricter right to the master to demand prepayment of the freight may have rather the contrary effect. *Id.*

ADVERSE POSSESSION. See *Limitations, Statute of*, 1.

1. Before a title to land by possession alone can be successfully maintained, the possession must be shown to cover the full period of twenty-one years, and that during all this time it has been actual, adverse, visible, notorious, exclusive and unbroken with claim of title against the world. *Ebbinghaus v. Killian*, 247.
2. Where the possession of a party is under and in privity with the estate of the person under whom such party claims, there can be no adverse possession against that person. *Id.*

ALEXANDRIA CANAL & BRIDGE COMPANY. See *Jurisdiction*, 3.**AMENDED BILL.** See *Equity Pleading and Practice*, 4.**AMENDMENT.** See *Limitations, Statutes of*, 11.**ANSWER.** See *Equity Pleading and Practice*, 1, 2, 6, 7, 10.

APPEAL. See *Practice*, 3.

APPEAL BONDS. See *Principal and Surety*, 1.

APPOINTMENT, POWER OF. See *Married Women*, 7; *Powers*.

ARBITRATION AND AWARD. See *Jurisdiction*, 1.

1. Reference of a cause, by the court, to one as "special referee" with directions to take and return the testimony adduced, and to report all the material facts "with his conclusions of law and his recommendations." The report was not under seal, was unaccompanied by a final finding and professed to be nothing more than a "recommendation."

Held, not an award under the Maryland act of 1785 and Rule 53 of this court, and a judgment entered thereon reversed, and the cause remanded to stand before the court as it did before the reference. *Strong v. Barbour*, 209.

2. An award ought to settle finally and conclusively the whole matter referred. It is contrary to the principles of a general reference that the court should take the award as far as it goes and supply all omissions by its decree. The award ought to be in itself a complete adjustment of the controversy submitted to the arbitrators. *Id.*
3. Where a court, under the authority of law, assents to a reference of a case to an arbitrator, it abdicates, *pro hac vice*, its own judicial functions, to the arbitrator; and his award, if conformable to the law and the rules regulating the subject, is taken as of equal force with a decision of a competent tribunal, needing only the formal ratification of the court to stand as a judgment of the tribunal itself. But this special power thus confided to the arbitrator, must be exercised in conformity to the law and the rules of court, and on these conditions alone will it be considered as an equivalent to the finding of the court and jury. *Id.*
4. A party cannot be deprived of the right to have his case passed upon by a jury unless waived by a regular reference to arbitrators, and its equivalent obtained by a proper final award. *Id.*

ASSIGNMENT. See *Jurisdiction*, 1; *Landlord and Tenant*, 6.

1. A deed of assignment, after making preference of two creditors and providing for the expenses of the assignment, directed that out of the residue of the proceeds, the assignees should pay *pro rata* the claims of such of his other creditors as should agree to execute full releases to him of their claims, and that the *pro rata* share which would be payable to any creditor who might refuse to execute such release, should be paid over to the grantor. Upon a bill filed against the assignor and assignees, praying, among other things, that the defendants be enjoined from carrying the assignment into effect, the court passed an order as follows: "The assignor is enjoined as prayed in the bill, and the other defendants are enjoined as assignees, as prayed for, *except as hereinafter provided*." The order then proceeded to constitute the assignees named in the deed, receivers of the court, and directed them to take possession of all the effects of the assignor referred to in the assignment, sell them and bring the proceeds into the court, the concluding sentence of the order being: "This order is without prejudice to any of the rights, interests, or equities of the parties or of the said creditors of, in and to the property aforesaid." After the sale of the goods by the receivers and the ratification thereof by the court, S., the assignor, made a second assignment of the same property to the same assignees (now the receivers) substantially the same in terms as the first, except that

ASSIGNMENT (*continued*).

it recognized the invalidity of the clause requiring releases and directed the distribution of the property equally among the creditors after the payment of the two preferred debts.

Held, That the clause requiring releases rendered the first assignment void, and that the second assignment having been made to cure this defect and with no purpose to interfere injuriously with the title of the receivers but rather to ratify and confirm it, so far from being in contempt of the existing injunction, was rather in aid of the order of the court, since the informality of the original assignment might be supposed to affect the title of the assignees and impair the rights of purchasers. *Morrison v. Shuster*, 190.

2. The dismissal of a bill filed to set aside an assignment, and, after a preliminary injunction obtained, restraining the assignor and assignees from carrying the assignment into effect, will deprive any party of the right to insist that the execution of a second assignment of the same property during the pendency of the suit was in contempt of the injunction. *Id.*
3. The mere fact of a *lis pendens* does not invalidate an assignment; a debtor pending a suit may assign to trustees all his effects for the benefit of all his creditors and deliver possession, and it will be valid. *Id.*
4. Where an assignment is defective a second assignment may be made to amend its errors, but it is only to be taken as a curative of the defects of the first, and not as establishing any additional or further priorities. Hence, provisions increasing the amounts of preferred claims over the sums named in the first deed by increasing the rate of interest cannot be operative against the statement of the same preferred claims in the first deed. In the same manner a particular statement in the second deed as to the percentage to be paid to the assignees for commissions cannot be operative against a general provision on the subject in the first deed, the functions of the second deed being only to render valid and effective the provision of the first. *Id.*
5. A debtor in insolvent circumstances, by assignment of his estate in trust made in good faith, when no law or lien prohibits, may lawfully prefer one creditor or set of creditors to another. *Id.*

ASSIGNMENT OF DOWER. See *Dower*.

ATTACHMENT. See *Landlord and Tenant*, 2, 4; *Practice*, 6.

ATTORNEY AT LAW.

1. When an attorney at law obtains a judgment in the capacity of executor, and is at the same time attorney for other parties in a suit against the same defendant, and a few days later obtains a judgment for them also, the court, in applying the proceeds of an equity of redemption, to the satisfaction of these judgments, will recognize no priority, but will distribute *pari passu*. *Poole & Hume v. Daly*, 460.

ATTORNEYS' FEES, CONTRACTS FOR. See *Contract*, 6; *Jurisdiction*, 2.

AWARD. See *Arbitration and Award*.

BAILOR AND BAILEE. See *Bona Fide Purchaser*.

1. A mere bailee for hire, though in possession, cannot give title to a third person. *Bridget v. Cornish*, 29.

BALTIMORE AND POTOMAC RAILROAD. See *Inquisition*.

BILL IN EQUITY. See *Equity Pleading and Practice*, 3, 6, 7, 8, 10, 11.

BILLS OF EXCEPTIONS. See *Indictment*, 1; *Practice*, 1, 3.

1. Plaintiffs having rested the case, the court instructed the jury that, upon the whole evidence, their verdict should be for the defendant. To which instruction the plaintiff reserved an exception, but the bills of exception, which were made part of each other, did not state in terms that they contained the "whole" of the evidence admitted at the trial. There was a statement, however, that "after the evidence had been given, as set forth in the foregoing bills," the plaintiffs rested their case.

Held, That the last statement may be accepted as equivalent to a statement that the bills contained the "whole" of the evidence.

Held, also, That to presume that other evidence was given by the plaintiff would be to presume against the decision of the court; in other words, that error had been committed, which is not admissible. *Merrick v. Giddings*, 394.

2. The same bills of exception described the evidence only as "tending to show."

Held, That the instruction to the jury to find for the defendant, answered the purpose of a demurrer to the evidence, and must be tested by the same rule, viz., that a demurrer to evidence admits not only the facts stated therein, but also every conclusion which a jury might fairly and reasonably infer therefrom. *Id.*

BILLS OF PARTICULARS. See *Promissory Notes*, 4.**BOARD OF AUDIT.** See *Ratification*.**BOARD OF PUBLIC WORKS.** See *Contract*, 1, 2, 3. *Ratification*, 2, 4.**BONA FIDE PURCHASER.** See *Recording of Deeds*.

1. Where there is a lease of personal property and delivery of possession to the lessee, if there are no other considerations entering into the transfer, the lease confers no such right as will protect a *bona fide* purchase from the lessee. *Bridget v. Cornish*, 29.
2. But where the *title* has been *qualifiedly* passed with the possession and the lien of the vendor is not reserved according to the condition of the statute requiring a written instrument of encumbrance duly recorded, the vendor parts with the possession at his peril, and if an equity in the property by purchase, concurring with the possession, is found in one who sells in open market to a *bona fide* purchaser, such sale carries title. *Id.*
3. M. obtained possession of a buggy and harness by virtue of the following paper: "This is to certify that I have hired of J. F. Bridget a buggy and harness for the term of three months from date, for the sum of \$25 per month, together with a cash payment of \$50, making in all \$125. The said John F. Bridget agreeing at the end of the time above mentioned to give me the privilege of purchasing the above named buggy and harness by paying an additional sum of \$125."

Held, That the equity of the property passed with the possession to M., and that a subsequent *bona fide* purchaser in open market for full value obtained title. *Id.*

BUILDING ASSOCIATIONS.

1. A piece of ground encumbered with a deed of trust to secure an indebtedness to a building association, was sold at public auction, subject to the trust. The secretary of the association acted as auctioneer, and announced that the indebtedness to the association amounted to a given sum.

Held, That as between the purchaser and the association the sum so

BUILDING ASSOCIATION (*continued*).

mentioned must be considered as the real indebtedness. *Building Association v. Hilton*, 107.

2. The fact that a piece of property is purchased subject to the lien of a building association for advances to a stockholder, which lien the purchaser agrees to discharge by monthly payments equal in amount to that agreed to be paid by the stockholder, does not entitle the association to credit these monthly payments in the same manner that might have been done had they been made by the stockholder. Such a purchaser is to be chargeable only with the purchase money and six per cent. interest until paid. *Id.*

3. F., a stockholder in a building association, borrowed a sum of money from the association, his wife, and the co-heirs with her of a piece of land, joining in a deed of trust pledging the land to secure the loan. Afterwards the association undertook to foreclose the trust for an alleged default. Upon a bill filed by the grantors to restrain the sale and to compel the association to allow certain credits in their settlements of F.'s accounts, it was

Held, That whatever might be the proper terms of settlement between F. and the association, the grantors were not bound thereby if those terms were in opposition to the provisions of the deed of trust; that they stood only in the position of sureties who have agreed to answer for the default of a debtor; that the measure of their liability was to be determined solely by the terms of the instrument creating it, and, if by these terms the proceeds of the sale upon default made are to be applied (after the payment of expenses and trustees' commissions) to the satisfaction of so much of the debt secured as remains due after deducting therefrom the value of F.'s stock, equity will, before the sale and for the purpose of ascertaining the right of the association to foreclose the trust, require this credit to be made upon F.'s indebtedness, although as between F. and the association such a credit might not be proper. *Forsyth v. Building Association*, 205.

CARGO. See *Admiralty*.

CASE, CERTIFICATION OF TO GENERAL TERM. See *Practice*, 4; *Principal and Surety*, 2.

CERTIFICATES OF DRAWBACK.

1. The certificates of drawback issued by the District of Columbia, under the act of Congress of June 13, 1878, to holders of certificates of indebtedness for improvement assessments do not bear interest. *Thompson v. The District*, 463.

CERTIORARI. See *Practice*, 6; *Principal and Surety*, 2.

CHALLENGES OF JURORS. See *Jury*.

CHATTEL MORTGAGES.

1. A duly recorded deed of trust upon merchandise contained a clause permitting the grantor "to retain possession of and use the said goods," &c.

Held, That if this language were to be interpreted as permitting the grantor to continue the business of selling and disposing of the goods, it would, as to creditors, be a serious objection to the validity of the deed; but construed with the clause giving the trustee the power to take immediate possession if the grantor were found removing them, it is to be taken as merely meaning that the grantor is to take care of and use the property subject to the rights of the trustee. *Smith v. Kenney*, 12.

CHATTEL MORTGAGES (*continued*).

2. The same deed purported to secure a *bona fide* debt evidenced by four promissory notes ; the last note represented no actual indebtedness on the part of the maker, but was given with the private understanding that if, in case of foreclosure, the property realized the face of the four notes, then the amount represented by this last note was to be repaid the maker.

Held, That this was a secret contrivance which rendered the deed void as to creditors. *Id.*

3. A deed of trust given upon a stock of goods which authorizes the grantor to use and dispose of the goods at his own discretion, is void as against creditors. *Fox v. Davidson*, 102.

COINS OF UNITED STATES. See *Counterfeiting*.

CONFESSION OF JUDGMENT. See *Principal and Surety*, 1.

CONGRESS OF UNITED STATES. See *Ratification*, 2, 3, 4.

CONSIDERATION. See *Deed ; Interest ; Principal and Surety*, 2, 3.

1. If A is under a legal obligation to B to do a certain act for B, a promise by C, a third party, to A, in consideration of A's performance of that act, is not binding, because such performance of an act which A was already bound, though not to C, to do, is not a valuable consideration for C's promise. *Merrick v. Giddings*, 397.
2. When it is claimed that a promise is supported by a past consideration, it must be shown, as a matter of fact, that the promise was made in respect of that consideration. *Id.*
3. When it is claimed that defendant's promise was made in consideration of past services rendered by the plaintiffs at defendant's request, it must appear that those services were in fact rendered in consequence of the defendant's request. *Id.*
4. Where a thing previously done by the plaintiffs, at the request of the defendant, is a consideration from which the law implies a promise, a subsequent express promise, based upon the same consideration, different from, or in addition to, that which the law implies, is *nudum pactum*. *Id.*
5. Where A promises B to do something for the benefit of C, B may release A from that promise at any time before C makes himself a privy to it by adopting B's act of obtaining the promise. *Id.*

CONSIGNOR AND CONSIGNEE. See *Admiralty*.

CONSTABLES. See *Practice*, 6 ; *Replevin*, 2.

CONSTRUCTION OF STATUTES. See *Limitations, Statutes of*, 2, 3.

1. Statutes which are enacted as compromises in regard to matters of taxation, and which subject the municipality to obligations which did not exist before, are to be construed so that these new obligations shall not be made larger than the strict and precise terms of the statute require. *Thompson v. The District*, 463.
2. Penal statutes are to be construed like all other statutes, according to their plain and sensible meaning, and a plain and sensible purpose is not to be defeated by an arbitrary method of reading its words. The words are to be so construed as to effectuate the intention of complete protection against the crime, if their ordinary and reasonable meaning permit such construction. *United States v. Guiteau*, 498.

CONTRACT. See *Admiralty*, 5 ; *Consideration ; Evidence*, 15 ; *Exemptions ; Guaranty ; Married Women*, 1, 2, 3 ; *Principal and Surety*, 2, 3 ; *Ratification*, 1, 2, 3, 4 ; *Receipt*.

CONTRACT (*continued*).

1. A contract entered into with the Board of Public Works in respect to street improvements is to be treated as a contract with the District Government. (*Following Barnes' Case*, 91 U. S., 540.) *Strong v. District of Columbia*, 265.
2. The provisions of the act of Congress, February 21, 1871, which denied to the Board of Public Works all power of making contracts to bind the District, except in pursuance of appropriations made by law and not until such appropriations shall have been made, and declaring that all such unauthorized contracts or agreements shall be null and void, and forbidding the Legislative Assembly to authorize the payment of any claim against the District "upon any contract or agreement made without express authority of law," were within the limits of Congressional legislation. *Id.*
3. Consequently a contract for street improvement entered into with the Board of Public Works at a time when there was no antecedent appropriation for that work or for the materials furnished under such contract, is null and void, and inadmissible in evidence for the purpose of recovery upon it notwithstanding the work may have been performed and the materials furnished in conformity with its terms. *Id.*
4. A *quantum meruit* cannot be sustained for the recovery of money claimed to be due for work done under a void contract, payment of which is forbidden by law. *Id.*
5. On moving into his place of business, plaintiff signed the following agreement with defendant, the Washington Gaslight Company:
 "We, whose names are hereunto subscribed, agree to take gas from the Washington Gaslight Company upon the condition that the company reserves to itself the right to refuse to furnish or at any time to discontinue gas to any premises the owner or occupant of which shall be indebted to the company for gas or fittings used upon such premises or elsewhere."
Held, That this contract related only to future delinquencies, and that defendant was liable in damages for cutting off plaintiff's supply of gas because of non-payment of an old bill for gas furnished before the signing of this contract and at another place. *Lloyd v. Gaslight Co.*, 331.
6. If A promises B to hold and not to pay over to C a fund belonging to C, until certain fees due to B from C shall be paid out of it, but does pay over the same to C before those fees are paid; and B, knowing that fact, makes a settlement with C, giving a receipt releasing C from further claim:
Held, That if A's promise was binding, he was liable only for such injury as B might suffer by reason of his consequent inability to obtain his fees from C, and that B's settlement and release of C released his right of action against A for injury suffered by reason of A's turning over the fund. *Merrick v. Giddings*, 394.

CORPORATION LAWS. See *Evidence*, 1.

CORROBORATION OF ACCOMPLICE. See *Accomplice*, 5, 7.

COSTS. See *Practice*, 7.

COUNTERFEITING.

1. Sections 5457 and 5458 R. S. U. S. differ from each other, both in the description of the crimes therein denounced and as to their punishment. *United States v. Bicksler*, 341.
2. Under Section 5457 Rev. Stats. U. S. the offense of having in possession counterfeit gold or silver coins is not complete unless the

COUNTERFEITING (*continued*).

accused had them in his possession "knowing the same to be false, forged, or counterfeited." But there is no necessity for the averment or proof of such *scienter* under Section 5456, which provides for punishing the having in possession counterfeit *minor coinage*. *United States v. Bicksler*, 341.

3. The accused for the former offense may be imprisoned to the extent of ten years, while the limit of imprisonment for the latter is three years. Therefore, where the prisoner is indicted and found guilty under the latter section (5458), a sentence of imprisonment for *eight* years is erroneous. *Id.*
4. Section 3515 R. S. U. S. establishes certain coins to which it affixes a certain designation, and by which alone they are thereafter to be known. They are "minor coins; known by no other appellation; and none other than these particular coins are embraced in that name; and as none of these minor coins contain silver, there is no such thing known to the law as "minor silver coinage." *Id.*
5. The old five cent pieces are not "minor coins" within the meaning of the law. The punishment for forging them must be sought under the section punishing the counterfeiting of silver coins, and not under the section relating to minor coinage. An indictment, therefore, which charges the prisoner with counterfeiting certain coins "in the resemblance and similitude of the *minor silver coinage* which has been coined at the mints of the United States called a half-dime," is contradictory and sets forth an offence not known to the law. *Id.*
6. Where the prisoner is charged with having in his possession certain counterfeit money with intent to defraud, it is not necessary to give the *name* of the person to be defrauded, the averment to defraud "a certain person to the jurors unknown," or "whomsoever he might be able to defraud," is a sufficient description within the terms of the statute. The statute does not require that there shall have been a consummation of the fraud by the actual passing of the money. The offence consists of having it in possession with intent to defraud. The possession alone is not criminal if unaccompanied with the intent. *Id.*

COURT, TERMS OF. See *Terms of Court*.

CREDIBILITY OF WITNESS. See *Evidence*, 3.

CREDITOR'S BILL. See *Equity*, 2; *Equity Pleading and Practice*, 8.

CREDITORS, PREFERENCE OF. See *Assignment*, 1, 4, 5.

CRIMES. See *Accomplice*; *Construction of Statutes*; *Counterfeiting*.

CRIMINAL LAW. See *Evidence*, 2, 7, 8, 9; *Indictment*; *Jury*; *Larceny*.

CURTESY, ESTATE BY THE. See *Equity*, 2.

1. Tenancy by the curtesy initiate is an estate thrown upon the tenant by operation of law, and he cannot, by refusing to take it, prevent the title from vesting in him and cause it to remain in the wife, nor can he, by disclaimer, transfer it to others; this would be to make a disclaimer a deed, which it is not, the object of a deed being to transfer property, and of a disclaimer to prevent the transfer; a grantee before consent can disclaim, and so may a devisee who takes by grant, but an heir and a tenant by the curtesy take by operation of law, the one takes immediately upon the death of the ancestor, and the other on the birth of living issue

CURTESY, ESTATE BY THE (*continued*).

and neither, by disclaiming the estate, can prevent it from vesting. *Bank v. Hitz*, 111.

2. Where an estate by the curtesy initiate vested in the husband before the passage of the act of April 10, 1869, such estate is liable for the husband's debts, whether the credit was given before or after the passage of the act. *Id.*

DAMAGES. See *Contract*, 5, 6; *Equity*, 5; *Inquisition*, 1, 3, 6; *Municipalities*; *Practice*, 2, 7.

1. A party is not entitled to recover damages for the depreciation of his property in consequence of the laying of a railroad track, if the property was not owned by him at the time the track was laid. The owner of the land at the time of the injury can alone take advantage of a claim for damages, and if he does not claim, his subsequent vendee cannot. *Dixon v. Railroad Co.*, 78.

DECREE. See *Dower*; *Equity Pleading and Practice*, 3, 4; *Payment*.

DEEDS. See *Assignment*; *Recording of Deeds*.

1. It is not permissible to show a consideration different in *kind* from that mentioned in the deed; but if the true consideration was different in *amount* it may be shown. Thus where the deed purports to be upon a money consideration, it cannot be shown that money did not constitute the consideration, or, if voluntary, or on a consideration of marriage or the like, it cannot be shown that it was a moneyed one. *Bank v. Hitz*, 111.

DEEDS OF TRUST. See *Promissory Notes*, 1; *Building Associations*; *Chattel Mortgages*.

DEMURRER. See *Indictment*, 1.

DEMURRER TO EVIDENCE. See *Bills of Exceptions*, 2.

DISCLAIMER. See *Estate by the Curtesy*, 1.

DISCOVERY. See *Equity Pleading and Practice*, 3, 4; *Payment*.

DISTRICT OF COLUMBIA. See, among numerous other headings, *Certificates of Drawback*; *Contract*, 12; *Limitations, Statutes of*, 5, 7.

DOWER.

1. A widow's dower before assignment cannot be sold by decree of a court of equity to satisfy an indebtedness due from the widow to the heir, growing out of her management of the heir's estate while acting as guardian thereof. *Hayden v. Weser*, 457.
2. The costs of all permanent improvements made before assignment of dower are to be charged to the heir and not to the doweress. *Id.*

DRAWBACK, CERTIFICATES OF. See *Certificates of Drawback*.

EJECTMENT. See *Trust*, 2, 3, 4.

ENDORSOR AND ENDORSEE. See *Promissory Notes*.

EQUITY. See *Assignment*, 1; *Jurisdiction*, 1, 2, 4; *Payment*; *Powers*.

1. A court of equity may direct the sale of the interest of an inventor in his patent, in order to satisfy a judgment obtained against him in a court of law (the writ of execution having been returned *nulla bona*); and for that purpose will require the patentee to make an assignment of the patent as provided in Section 4898 of the Revised Statutes of the United States, and in the event of the refusal of the patentee to do so, will appoint a trustee with authority to execute the same. *Murray v. Ager*, 87.

2. A wife's equity to a reasonable provision out of her estate against her husband and his creditors attaches only to such of her property as the husband cannot acquire without the assistance of a court of equity. If the husband or his assignee has already reduced the property into possession, the court will not interfere. There is no recognized principle by which a court of chancery can allow the wife a provision out of an estate by the curtesy intiate already vested in the husband, and which his creditors are seeking to have applied to the payment of his debts. *Bank v. Hitz*, 111.
3. Where there is an appeal board authorized and required to sit and hear all complaints as to over-valuation or impropriety of assessments and to revise the same, and its action is declared to be complete and final, persons who wilfully neglect to avail themselves of the opportunity so amply afforded them cannot expect a court of equity, after long delay, to relieve them from the consequences of their own laches. Especially will the court not substitute its own judgment for that of the tribunal expressly created for that purpose. *R. R. & Bridge Co. v. District of Columbia*, 217.
4. Courts of chancery have supervision and control of all unincorporated societies or associations. With respect to them they have the power of prevention of acts contrary to law and prejudicial to the interests of the community, or to the rights of individuals, and can afford specific relief where a recovery in damages would be an inadequate remedy for the wrong. *Elbington v. Killian*, 247.
5. So, where by reason of the numbers of the parties and the character of their rights, damages are unsuitable as a means of redress, equity will apply the required remedy. *Id.*
6. In a controversy over a trust claimed to have been created for religious purposes, chancery, which exercises jurisdiction in such cases on the ground of trust, must give effect to its provisions, if they be legal, and to that end must ascertain and determine its scope and object. In that investigation the court is authorized to resort to the early history of the church as contained in standard and authentic works on the subject prior in date to the existence of the particular controversy. *Id.*
7. Plaintiff filed his bill to obtain the surrender of a certificate of stock. He alleged that the defendant obtained it from him with the understanding that it was to be used for the purpose of exercising, in some way, an improper influence with certain officials of the government to inure to the benefit of plaintiff and defendant.
Held, That on plaintiff's own statement equity would deny him relief.
Jones v. Warden, 476.

EQUITY OF REDEMPTION. See *Attorney-at-law*.

EQUITY PLEADING AND PRACTICE. See *Assignment*, 1, 2.

1. A positive denial in the answer can only be overcome by the testimony of two witnesses, or of one witness and corroborating circumstances. *Rick v. Neitzel*, 21.
2. When the only witness for the complainant is himself, his testimony in order to meet the positive and absolute denial of the defendant, should be vigorous, strong and clear. *Id.*
3. Where there is a dispute in regard to partnership matters, and the parties have been so negligent as to lose the evidence of the partnership, and have kept their accounts in so confused a way that the court cannot see what decree would do justice between them, the bill will be dismissed. *Id.*
4. An order unappealed from upon a hearing on bill and answer discharging a prior order restraining an execution sale of property and directing the marshal to pay certain judgments out of the proceeds,

EQUITY PLEADING AND PRACTICE (*continued*).

- is not examinable on the hearing of an appeal from a decree subsequently made upon new and different facts raised by an amended and supplemental bill, filed by leave of court, when the leave granted to file the same does not reserve the right to raise any question as to the propriety of the order. *Gibson v. Gautier*, 35.
5. A bill which prays the appointment of a receiver on the ground that the defendant had so mixed complainants' goods with his own, that it would be extremely difficult to separate them, should charge that the alleged confusion was fraudulent or wrongful in order to justify the interposition of the court. *Morrison v. Shuster*, 190.
 6. The bill did not call explicitly for answers upon oath, it prayed that the defendants might answer, etc.
Held, not equivalent to an agreement to dispense with answers under oath. *Id.*
 7. Where an answer is responsive to the charges of the bill and swears away its equity, the denials of the answer must prevail, and the bill will be dismissed, unless the defendants' statements are contradicted by the testimony of two witnesses, or of one witness with pregnant corroborating circumstances. *Id.*
 8. Under a prayer for general relief the complainant can only claim relief of the same general nature as that prayed in the bill. So, too, the claims under the general relief clause must be consistent with the particular relief claimed, nor can different parts of the bill claim relief upon principles diametrically opposite. *Therefore where the complainant claims upon the distinct ground that he is not a creditor of the defendant and is denied relief, he cannot, under the prayer for general relief, claim upon the hypothesis that he is a creditor. *Id.*
 9. If the court has no jurisdiction when the bill is filed (by reason of the complainants not being judgment creditors), the recovery of a judgment afterwards cannot be set up by a supplemental bill so as to confer the jurisdiction; the supplemental bill falls with the original. *Id.*
 10. Where an answer to a bill filed for a discovery contains admissions in favor of the complainant, they have the force of testimony in his favor. *R. R. & Bridge Co. v. District of Columbia*, 217.
 11. A bill in the nature of a bill of interpleader is not within the rule applicable to bills of interpleader strictly so called, viz., that they can only be maintained where the plaintiff claims no interest in the subject matter, for in many cases the former will lie by a party in interest to ascertain and establish his own rights where there are other complicating rights between third parties. *Ebbinghaus v. Killian*, 247.

ESTATE BY THE CURTESY. See *Curtesy, Estate by the*.

ESTATES OF INHERITANCE. See *Powers*.

ESTATE, PRIVITY OF. See *Privity of Estate*.

ESTOPPEL. See *Principal and Surety*, 2; *Receiver*.

EVIDENCE. See *Accomplice*; *Bills of Exceptions*, 1, 2; *Demurrer to Evidence*, 2; *Contract*, 3; *Counterfeiting*, 1; *Equity Pleading and Practice*, 3, 7, 10; *Guaranty*; *Insanity*, 1, 2, 3; *Judgment*; *Murder*, 2, 3; *Practice*, 8, 9; *Receipt*.

1. It is error to admit in evidence an alleged ordinance of the corporation of Washington without further proof of its enactment, than the fact of finding it printed in a publication entitled, "Laws of the Corporation of the City of Washington, passed by the Sixty-

- fifth Council. Printed by order of the Council. Washington. R. A. Waters, printer, 1868." *District of Columbia v. Johnson*, 51.
2. There is no particular limit as to the time anterior to the homicide when evidence of threats made by the defendant against the deceased will be excluded. The judgment of the court on such a question is to be guided by the circumstances of the case. *United States v. Neverson*, 152.
 3. Where the credibility of a witness is impeached by the opposite party, the witness' prior declarations may be given in evidence to show the consistency of his statements. *Id.*
 4. An exception, based upon the court's permitting certain questions to be asked the defendant, and requiring their answer, will be overruled when no harm appears to have been done the defendant by the answer. *Id.*
 5. Where an offer of proof is made and rejected, the party complaining must set out on the record the facts which he proposed to prove in order that the court may see whether he has been prejudiced by the rejection of his offer. *Id.*
 6. Where, on cross-examination, a witness is asked a question not collateral but material to the issue, the answer is not conclusive upon the party asking it, and he may offer evidence to contradict it. *Id.*
 7. The justice trying the case below, in charging the jury, read to them sec. 13 and note 2 of 3 Greenleaf's Evidence, 13th ed., on the subject of reasonable doubt and presumption of innocence. The court in general term, on exceptions, finds no error in this.
 8. The prisoner is entitled to the presumption of having sustained a good character up to the time of the alleged murder, and this presumption remains in his favor, unless the jury shall believe from the evidence that he in fact was not entitled to such reputation.
 9. Evidence of good character offered in behalf of a prisoner, if believed by the jury, should be duly weighed by them as a fact in his favor.
 10. The jury are the exclusive judges of the weight and effect of the evidence, and they may believe or disbelieve one or another of the witnesses at their discretion.
 11. As stated in the exception, the defendant's offer was "to prove that the defendant company *was under no obligation* to erect barricades."
- Held*, That, as so stated, this was simply an offer to establish by evidence before the jury a proposition of law as to the defendant's liability and was properly rejected. *District of Columbia v. Railroad Co.*, 314.
12. Where a party liable over has been duly vouched to appear and defend the suit, but fails to do so, he is bound by the facts which must have been found by the jury to justify their verdict, and he will not be permitted to show the contrary in an action over against him. *Id.*
 13. An instrument which is void as a contract may be used as evidence of a collateral fact, as, for example, of an acknowledgment of a subsisting indebtedness. *Thompson v. Shepherd*, 385.
 14. Evidence to be admissible must be applicable to the averments of the declaration. *Johnson v. District of Columbia*, 427.
 15. Testimony by the defendant's wife (in the case at bar a divorced wife) that she saw no indications of insanity exhibited by him during their associations, does not come within the rule which protects the privacy and confidence of the marriage relation. *United States v. Guiteau*, 498.

EXCEPTIONS, BILLS OF. See *Bills of Exceptions*.

EXECUTION. See *Attorney at Law* ; *Equity*, 1 ; *Equity Pleading and Practice*, 4 ; *Landlord and Tenant*, 1, 2, 3, 4 ; *Practice*, 6 ; *Stay of Execution* ; *Replevin*.

EXECUTORY AGREEMENT. See *Exemptions*.

EXEMPTIONS. See *Practice*, 6 ; *Replevin*, 2.

Section 797 of the Revised Statutes of the District of Columbia, exempting certain property of the head of a family or householder from execution, rests upon public policy. The statute was intended for the protection and preservation of the family, notwithstanding the improvidence of its head, and an executory agreement to waive its benefits is inoperative and void. *Wallingsford v. Bennett*, 303.

EXPERT WITNESS. See *Insanity*, 2.

FORBEARANCE. See *Interest*.

FRAUD. See *Equity Pleading and Practice*, 5 ; *Landlord and Tenant*, 1 ; *Larceny* ; *Replevin*, 3.

The mere silence of a purchaser as to his financial condition at the time of sales made to him, even if he had then known himself to have been insolvent, is not sufficient to warrant a rescission of the sales for fraud ; an honest though abortive purpose to continue business and pay for goods bought, is consistent with the vendee's knowledge of his insolvency, and the purchase is not fraudulent when made with such intent, though founded in delusion and unreasonable expectations ; there must have been *an intent not to pay at the time of purchase*. *Morrison v. Shuster*, 190.

FREIGHT. See *Admiralty*.

GOOD CHARACTER, PRESUMPTION OF. See *Evidence*, 8, 9.

GUARANTY.

1. Plaintiff sued defendant as guarantor, declaring on a paper purporting to be the guaranty of the defendant, and described it as bearing date November 13, 1874. The principal contract bore date November 13, 1874, and was signed by the principal only ; at the foot thereof, and on the same sheet of paper, was the contract of guaranty signed by defendant only ; it bore no date, but referred in its terms to the principal contract ; it was proven by parol evidence that both contracts were signed the same day.

Held, That these contracts were separate instruments, and that the guaranty being signed by a different party did not take its date from the principal contract ; as it was not dated, it, therefore, did not conform to the paper described in the declaration, and was not admissible in evidence to prove the court act of the defendant. *Phillips v. Smoot*, 478.

HEAD OF FAMILY. See *Exemptions*.

HEIR. See *Dower*.

HIRE, CONTRACT OF. See *Bailor and Bailee*.

HOMICIDE. See *Evidence*, 2 ; *Insanity*, 4 ; *Murder*.

HUSBAND AND WIFE. See *Curtesy, Estate by the* ; *Equity*, 2 ; *Evidence*, 15 ; *Married Women*, 3, 4, 5, 6.

1. The rules of the common law respecting the estate in the lands of inheritance of the wife to which the husband becomes entitled, were in force in the District of Columbia, prior to the act of April 10, 1869. (R. S. D. C., 727.) *Bank v. Hitz*, 111.

2. Where the marriage took place in 1856, and in 1864, the wife, by the death of her father, became entitled to an estate of inheritance, there having been lawful issue born alive and capable of inheriting the estate, the husband has an estate in the property as tenant by the curtesy initiate, and it may be seized and sold under a common law execution for the payment of his debts. *Id.*
3. The act of April 10, 1869, has not a retroactive effect and does not where the marriage was contracted before the passage of the act, take away or interfere with the pre-existing vested rights of the husband in the real estate of his wife. *Id.*

ICE. See *Admiralty*, 2, 6, 7.

IGNORANCE OF THE LAW. See *Public Statutes, Knowledge*.

IMPROVEMENT ASSESSMENTS. See *Certificates of Drawback*.

INDICTMENT. See *Counterfeiting; Murder*.

1. Although there has been no demurrer interposed or motion to quash the indictment, this court is nevertheless at liberty to pass upon defects in the indictment, upon a motion for a new trial on exceptions to the rulings of the court below.
2. The reversing of the judgment of the court below, because of the insufficiency of the indictment, does not exonerate the prisoner from being tried upon a good indictment, the first trial being simply what is known as a mistrial. *United States v. Bicksler*, 341.

INJUNCTION. See *Assignment*, 1; *Jurisdiction*, 4; *Payment*.

INNOCENCE, PRESUMPTION OF. See *Evidence*, 7.

INQUISITIONS. See *Damages*, 1.

1. The inquisition provided for by the act of Congress of May 21, 1872, granting the B. & P. R. R. Co., the right to lay its tracks along Sixth street in the city of Washington, was for a different purpose from that specified in the act of February 5, 1867, authorizing the extension of a lateral branch of that road into the District of Columbia. That of the act of 1867 applied to cases where the company desired to locate its road over any land within the District, and in the event of a failure to obtain the assent of the owner for any of the reasons set forth in the act, the company was to make application to a justice of the peace for the county of Washington, who thereupon was to issue his warrant to the marshal requiring him to summon a jury to meet on the land and proceed to value the damages which the owner would sustain by its use or occupation by the company. But the damages to be ascertained under the authority of the act of 1872, viz., "the appreciation or depreciation of the value of the property situated along said street," was a matter not provided for by the act of 1867, and although the act of 1872 declared that the amount which the company should pay should be ascertained in the *manner and form* as provided by the act of 1867, this simply referred to the inquisition as a convenient method of ascertaining the damage, and did not mean that the inauguration of the proceeding was to rest only in the pleasure of the company. *Dixon v. R. R. Co.*, 78.
2. The statute of limitations does not bar the remedy where the liability of the defendants is created not merely by the act of the parties, but by the positive provisions of a statute, nor will it be held to embrace any proceeding at law not therein enumerated. Hence as the Maryland act of 1715, chap. 23, sec. 2, which is the statute of limitations in this District, in none of its provisions, makes allusion to a proceeding by inquisition, such a proceeding

cannot be regarded as an action within the meaning of the statute. *Id.*

3. In an action at law to recover damages to the plaintiff's property by reason of the laying of a railroad track, the only recovery which can be had would be in respect of temporary or transitory damages accrued up to the time of the inception of the suit, whereas, a statutory inquisition, which is not a suit in the sense of the law, is instituted to ascertain for all time the amount of permanent damages sustained. But a proper subject for consideration by the jury on the inquisition would be the recovery which might be had in a pending action at law, by way of reducing the amount of their award. *Id.*
4. At such an inquisition if the marshal submits the names of the jurors to the respective attorneys, that they may strike from the list until the number is reduced to twelve, and the attorney for the defendant refuses to do so, the marshal may perform that duty in his stead, as otherwise it would be possible in any case for a party defendant to prevent the rendition of a verdict by refusing to strike from the panel. *Id.*
5. There is no force in an objection that in four separate inquisitions, the same twenty jurors were presented as a panel in each case. *Id.*
6. Nor will the court consider the objections whether a sufficient number of witnesses were sworn and examined as to the amount of the alleged damages. *Id.*

INSANITY. See *Evidence*, 15; *Practice*, 9.

1. Insanity is a defense on the very ground that it disables the accused from knowing that his act is wrong. The very essence of the inquiry is whether his insanity is such as to deprive him of that knowledge. If, therefore, a witness is competent to give his opinion as to the mental capacity of the accused, he is competent to state his opinion as to the degree of capacity or of incapacity, by reason of disorder, and whether the disorder seemed to have reached such a degree as to deprive him of the knowledge of right and wrong. *United States v. Guiteau*, 498.
2. The question whether a certain trait in the defendant's character is an indicium of insanity involves the question of its nature, and an expert witness on the subject of insanity does not exceed the limits of the inquiry in stating precisely whether the trait be a vice or a disease. *Id.*
3. Where, for the purpose of proving the insanity of the defendant, evidence is given searching the history of his whole life down to the time of the act charged in the indictment, and his moral nature and traits are presented to the jury as showing that acts done by him must be accounted for by a conclusion of insanity, testimony is admissible in rebuttal as to particular acts and conduct of the defendant contemporaneous with the history produced on his part and tending to disprove the existence of the grounds on which the inference of insanity is based. *Id.*
4. Whether the inability to resist wrong by one having an actual knowledge of the difference between right and wrong, is such a mental disorder as would constitute a defense to the crime of murder, *quære*. *Id.*

INSOLVENCY. See *Assignment*; *Fraud*.

INSTRUCTIONS TO JURY. See *Bills of Exceptions*; *Practice*, 8, 9.

INTEREST. See *Assignment*, 4; *Certificates of Drawback*; *Contract*; *Promissory Notes*; *Practice*, 7.

1. A verbal agreement to receive a greater rate of interest than six per

- cent. for forbearance after a debt is due is void under the Revised Statutes of the District of Columbia, Sec. 715. *May v. Shepherd*, 430.
2. A void promise to pay illegal interest is not a valuable consideration for a promise to forbear. It is a mere *nudum pactum*. *Id.*

INTERPRETATION OF STATUTES. See *Limitations, Statutes of*, 3.

JUDGMENT. See *Arbitration and Award*, 6, 3; *Attorney at Law*; *Equity*, 1; *Equity Pleading and Practice*, 4, 9; *Indictment*, 2; *Practice*, 6; *Principal and Surety*, 1.

A judgment merges the cause of action, so that where a judgment has been obtained against one of three makers of a note and the creditors are seeking to have the property of the debtor applied to the satisfaction of the judgment, no inquiry can be made in that proceeding into the consideration or original surroundings of the note. Nor is it any defense that the other parties to the note have not been properly proceeded against by the complainant, for if a creditor is to be prevented from collecting his debt until each of the other debtors has been equally pressed, the debt will never be made at all. *Bank v. Hitz*, 111.

JURISDICTION. See *Equity Pleading and Practice*, 9; *Murder*, 5, 6; *Payment*.

1. The Joint Commission established under the treaty of July 4, 1868, between Mexico and the United States, made an award in favor of certain claimants against Mexico. The money having been paid into the United States Treasury, subject to the control of the Secretary of State, one-half was paid to the claimants and the remainder retained, subject to the claims of the attorneys who were conflicting assignees of this moiety of the fund. On a bill filed in this court to settle their equities it was, on a plea to the jurisdiction:

Held, 'That where the fund is in the Treasury of the United States, and the parties claiming it are before the court, the court will take jurisdiction. *McManus v. Standish*, 147.

2. It is not necessary in such a case that the original claimants before the commission should be in court if it appear that they disclaim any interest in the moiety in dispute. *Id.*
3. The whole bed of the Potomac river with all the islands therein up to high-water mark on the Virginia shore is within the explicit terms of the Maryland Charter, and therefore the whole of the Alexandria Canal and Bridge Company's bridge beginning at the southern terminus of Lingan street, in Georgetown, and extending across the river to high-water mark of the Virginia shore, is within the jurisdiction of the District of Columbia. *Railroad and Bridge Co. v. District of Columbia*, 217.
4. A bridge which lies partly in the District of Columbia and partly in the State of Virginia, cannot be assessed by the District upon its entire length; only that portion within the District can be assessed, otherwise the assessment is illegal and a bill to enjoin a sale of the property by the District authorities for non-payment of the tax will be sustained.

JURORS. See *Accomplice*, 2, 4, 5; *Arbitration and Award*, 3, 4; *Bills of Exceptions*, 1, 2; *Evidence*, 8, 9, 10, 12; *Inquisition*, 4, 5; *Practice*, 2, 8.

It is no ground for a new trial that the justice trying the cause erroneously ruled certain persons competent as jurors if it appears that they did not sit on the jury, and that the defense in challenging them did not exhaust their peremptory challenges, but had

others to spare when the jury was completed. *United States v. Neverson*, 152.

LACHES. See *Equity*, 3.

LANDLORD AND TENANT. See *Practice*, 6; *Principal and Surety*, 2.

1. Although a fraudulent sale of goods be set aside, they are nevertheless liable to the landlord's lien for rent due by the fraudulent vendee to the landlord upon whose premises they have been kept, and this notwithstanding there are judgment creditors of the vendor whose executions issued before the landlord's lien attached. *Gibson v. Gautier*, 35.
2. By the provisions of Section 678 of the Revised Statutes of this District, the landlord's lien for rent, if it exists at the time he commences proceedings in attachment, continues until the termination of those proceedings, and his lien is not destroyed by the fact that at the time of issuing his attachment the goods were in the custody of the marshal under a levy made at the instance of an execution creditor. *Id.*
3. The statute of 8 Anne, ch. 14, is in force in this District, and if the marshal levy an execution and make sale of property, he is obliged, after due notice given him by the landlord, upon whose premises the goods are, to pay from the proceeds all rent due up to the time of the sale, and if the sale take place during the month there can be no division of the rent for that month. To compel the marshal to pay over one year's rent, the landlord may move the court out of which the execution issues for an order to pay the amount due him from the sale, and this motion may be made at any time before the money is paid over, the marshal being bound on the receipt of a landlord's notice to retain the money. *Id.*
4. It seems, also, that the lien of the landlord is not lost or impaired by his suspension for a month of the execution issuing under the judgment obtained in the attachment proceedings. *Id.*
5. The lessee will not be allowed to dispute his lessor's title after he has acknowledged it and entered into possession, but if he has never taken possession under that title, or if the estate has never existed which it is claimed was contracted for, the lessee may show it and it is error for the court to take from the jury evidence bearing upon that point. *District of Columbia v. Johnson*, 51.
6. Where the goods and chattels of the tenant have been sold by virtue of an assignment, the landlord's claim upon the fund, to the extent of three months' rent, has priority over the claims of simple contract creditors. This priority being given him by the statute. R. S., D. C., sec. 678. *Fox v. Davidson*, 102.

LANDLORD AND TENANT PROCEEDING. See *Principal and Surety*, 2; *Receiver*.

LARCENY.

1. Where the mere possession of a chattel is fraudulently obtained from the vendor by the vendee, *animo furandi*, a conversion of such chattel by such vendee is larceny. *U. S. v. Rodgers*, 419.
2. The facts that a portion of the purchase money is paid by one of two vendees in collusion and receipted for by the vendor, and the chattel left in the possession of said vendee, while the vendor proceeds to another place to receive the balance of the purchase money from the other collusive vendee, do not work transfer of the title; it remains in the vendor until the transaction is complete, and the whole of the purchase money paid; and a conversion of the chattel by the vendee in possession before the entire purchase

money is paid, constitutes larceny on the part of both of such collusive vendees where they have conspired to obtain possession of such chattel by fraud or deceit for the purpose of conversion. *Id.*

LEGISLATIVE ASSEMBLY OF THE D. C. See *Ratification*, 2.

LEGISLATIVE ASSENT.

In 1770 a trust for the benefit of an unincorporated religious body was created in lands situated in what now constitutes the District of Columbia. Subsequently, under the act of Maryland of 1791, ch. 45, making provision for the allotment and assignment of certain lots of ground to certain parties, "to hold the same in their former estate," two lots were conveyed to the trustee in lieu of the original trust property held by him.

Held, That the conveyance made under the authority of this act was to be taken as a full legislative assent to the validity of the title of the trustee. *Ebbinghaus v. Killian*, 247.

LEVY. See *Landlord and Tenant*, 2, 3; *Replevin*.

LIEN. See *Admiralty*, 4; *Landlord and Tenant*, 1, 2, 4, 6.

LIFE ESTATES. See *Powers*.

LIMITATIONS, STATUTE OF. See *Adverse Possession*; *Inquisition*, 2.

1. The statute of limitations has no application to express subsisting trusts. In such cases the trustee, while he holds possession, holds in behalf of the real *cestui qui trusts*, whoever they may be. He cannot, therefore, invoke adverse possession in favor of persons claiming as beneficiaries if, under the trust originally impressed upon the property, they are not in fact the true beneficiaries. *Ebbinghaus v. Killian*, 247.
2. Statutes of limitations are to be construed strictly and will not be extended by implication. *Dist. of Col. v. W. & G. R. R.*, 361.
3. To arrive at the correct meaning of a statute the court will examine its language throughout, and will import words from all portions of it to qualify the meaning of the whole. *Id.*
4. As respects public rights municipal corporations are not within ordinary limitation statutes. *Id.*
5. Under the second section of the Revised Statutes relating to the District of Columbia, the liability of the District to be sued and impleaded to the full extent of other municipalities is plainly implied in the general language which creates it "a body corporate for municipal purposes," and, in the absence of any provision to the contrary, whatever liabilities may properly attach to municipalities in general, are equally devolved upon the District government. Hence, whenever the Maryland act of 1715, ch. 23, which is the statute of limitations in force in this District, may be interposed to a claim of an ordinary municipality, it may be availed of against the District of Columbia. *Id.*
6. Charges or assessments made against property owners for street improvements, by a municipality having power so to do, are in the nature of taxes, and in the absence of some additional provision declaring limitation a bar, such a plea is no defense. *Id.*
7. When the charters of the companies bind them to pave and keep in repair the streets upon which their tracks are laid, and they neglect so to do, and the District thereupon does the work and brings suit against them for reimbursement, the fact that no assessment had been made against the companies by the District for such work is immaterial in its effect upon the right to set up limitations as a defense; the companies occupy the same position with respect

to the statute of limitations that they would have held if the amount chargeable against them had been made the subject of a regular assessment which they had refused to pay and for which the action had been brought. *Id.*

8. An acknowledgment of indebtedness, in order to raise an implied promise which will take a case out of the statute of limitations, must be made in such form or under such circumstances as to import a willingness to pay; but such willingness need not be expressed in terms. *Thompson v. Shepherd*, 385.
9. An acknowledgment of indebtedness is not defective on the ground of uncertainty as to the amount due, because it is shown to have admitted too large an indebtedness, and to be subject to reduction on the part of the debtor. *Id.*
10. A case stated in which the court finds a sufficient acknowledgment of indebtedness to prevent the bar of the statute. *Id.*
11. The amendment of a declaration, so as to state for the first time a cause of action, is equivalent to bringing a new suit as of the date of the amendment; and if the statutory period of limitations has elapsed, the action will be barred, notwithstanding the original declaration was filed within the statutory period. *Johnston v. District of Columbia*, 427.

LIS PENDENS. See *Assignment*, 3.

MALICE. See *Murder*, 2.

MARRIED WOMEN. See *Husband and Wife*.

1. Under the Married Woman's Act of 1869, R. S. D. C., a married woman owning a separate estate may contract to repair her house, or to have anything done to it that will put it into a condition to make it rentable. *Harmon v. Garland*, 1.
2. Defendant, a married woman, owned a house as her separate estate. Plaintiffs sold and delivered furniture to her upon her promise to pay for same out of said estate. The defendant bought and used the furniture for the purpose of furnishing the house.
Held, That this was a contract having relation to her separate estate.
Id.
3. A husband can only act in respect of the wife's separate estate as her agent, and he can bind her only to the extent of the authority she gives him, or which she by her acts gives him the appearance of having. *Brooke v. Barnes*, 5.
4. The fact that a wife had previously given her husband authority to act for her in two or three transactions, is no ground for inference that she has therefore given him authority to do whatever is to be done in another transaction of an altogether different character. *Id.*
5. When the husband undertakes to act as agent of the wife, he who deals with him as such must inquire into the extent of his authority. The mere assertion of the agent as to his powers, is not sufficient to bind the principal. *Id.*
6. A husband being indebted to B, gave him in satisfaction thereof an order, signed by himself and wife, upon a fund belonging to the separate estate of the wife. The wife had signed and given the order to her husband for another purpose; but the husband represented to B that he had authority to use it in payment of this indebtedness. On a bill in equity filed by the wife, the court compelled B to refund the money. *Id.*
7. If not forbidden by the express terms of the settlement, when a married woman having a separate estate settled upon her for life, with a general power of appointment by last will and testament, executes the power, the appointees are postponed to the claims of

creditors for family supplies purchased by the appointer's insolvent husband, with her knowledge and consent, and upon the credit and with the intention to charge her separate estate therewith; and it is not necessary that she should have executed any instrument in writing evidencing her intention to have the estate so charged, it will be sufficient if the purchases were made and the goods supplied upon the credit of her separate estate, and she assented to it. *Knowles v. Dodge*, 66.

8. The statute in force within the District of Columbia governing the rights and liabilities of married women possessed of separate property, and commonly called the Married Woman's Act, has not changed the common law rule that a married woman cannot be sued *at law* for supplies furnished to her for the support of the family, although they were furnished upon the faith and credit of her separate estate, and upon her promise to pay for the same out of said estate. *Schneider v. Garland*, 350.

9. Defendant, a married woman, purchased a carriage of plaintiffs, upon credit. At the time of the purchase she stated that she was living in the country and wanted the carriage to ride backwards and forwards to look after her property in the city.

Held, That the defendant being a married woman was not liable in an action at law; affirming and following *Schneider v. Garland*, *ante*, p. 350. *McDermott v. Garland*, 496.

MARSHALL. See *Inquisition*, 4; *Landlord and Tenant*, 2, 3.

MERGER. See *Judgment*.

MEXICO. See *Jurisdiction*, 1.

MORTMAIN, STATUTES OF.

The statutes of mortmain (in force in Maryland, 1770,) applied only to corporations. Trusts made by feoffment grant or devise to unincorporated bodies for charitable uses and purposes, not deemed superstitious, were not invalid, and a trust for a religious purpose has long been declared a charitable purpose in this respect. *Ebbinghaus v. Kilian*, 247.

MOTIONS. See *Indictment*; *Practice*, 1; *Principal and Surety*, 2.

MUNICIPALITIES. See *Construction of Statutes*; *Limitation, Statutes of*, 4, 5, 6, 7; *Ratification*, 1.

1. Where a municipality is mulcted in damages for injuries received by a party in falling into an excavation made by a railroad company in one of its streets, the latter is liable over for the amount paid. *District of Columbia v. Railroad Co.*, 314.
2. Nor will the fact that the action was brought by the injured party against the municipality instead of directly against the person engaged in such work enable the latter, in an action over against it, to set up absence of negligence as a defense on the ground that the municipality granted permission to do the work. The effect of such a grant being only to prevent the grantee from being a trespasser in the bare act of breaking up the street; but it gives no exemption from liability for injury resulting to others in the execution of the work. *Id.*
3. It is no ground of action against a municipal corporation that it has committed a mere error of judgment in the construction of a street sewer whereby damage ensues to adjoining property, when it is not alleged that the defect of construction was caused by the carelessness of the defendant, or was brought to its notice. *Johnston v. District of Columbia*, 427.

MUNICIPAL ORDINANCE. See *Evidence*, 1.

MURDER. See *Accomplice*, 3 ; *Insanity*, 4.

1. The different grades of homicide distinguished and briefly defined. *United States v. Neverson*, 152.
2. Malice is evidenced by previous threats or grudges, lying in wait or by poison. It is implied when the killing is done, in an attempt to rob or commit some other felony. *Id.*
3. The felonious purpose to kill need only exist for a moment before striking the blow.
4. On an indictment for murder against three, all may be found guilty, although only one or two dealt the blow, if the others were present, aiding and abetting—in sympathy with the deed—watching, or otherwise aiding while near enough to give assistance. *Id.*
5. Section 5339 of the Revised Statutes of the United States applies to murder committed within the District of Columbia. *United States v. Guiteau*, 498.
6. Murder is committed within the District of Columbia when the felonious blow is struck there, notwithstanding the consequent death happen without the District and in one of the States. *Id.*

NEGLIGENCE. See *Municipalities*, 2, 3.

NEW TRIAL. See *Indictment* ; *Jury* ; *Practice*, 1.

NOTICE. See *Municipalities*, 3 ; *Recording of Deeds*.

PARTICULARS, BILLS OF. See *Promissory Notes*, 4.

PARTNERSHIP. See *Equity Pleading and Practice*, 3.

PATENTS. See *Equity*, 1.

1. A mere aggregation and bringing together of old devices or instrumentalities is not a patentable invention unless some new result is obtained. *Fisher v. Commissioner of Patents*, 212.
2. The result of holding firmly the ends of railroad rails by means of screws or bolts, and by a plate under the ends is well known, and the simple adoption and application of a ribbed plate with the bolt screwed to its place between the ribs is only the application of two old devices without the attainment of any new result. *Id.*

PAYMENT. See *Promissory Notes*.

Defendant, having been sued at law upon a promissory note, filed a bill in equity to enjoin the suit, on the ground that he had a complete defense in equity, by reason of certain credits that would amount to a payment of the note. Subsequently, and before the hearing in equity, he filed a plea of "payment" in the case at law. A final decree was afterwards passed dismissing the bill, and then, on the trial of the suit at law, the plaintiffs, to meet the defendants' plea of payment, offered in evidence the decree, and asked the court to instruct the jury that this decree closed all defense as to any alleged payment on account of the note, which the court refused to do.

Held, Error, for the reason, that equity having taken jurisdiction of the cause, had necessarily gone into the condition of accounts between the parties to ascertain whether the note had been paid, and if paid the suit at law would have been enjoined. The dismissal of the bill was, therefore, an adjudication by the court that the note had not been paid, *Stevens v. Du Barry*, 294.

PERMANENT IMPROVEMENTS. See *Dower*, 2.

PLEADING. See *Promissory Notes*, 4, *Contract*, 4 ; *Counterfeiting*.

POTOMAC RIVER. See *Jurisdiction*, 3.

POWERS. See *Married Women*, 7.

The effect of the execution by tenant for life of an instrument in writing, in the nature of a last will and testament, disposing of the fee under a general power of appointment, is to change what would otherwise have been but a life-estate into an estate of inheritance, and subjects the property appointed to the claims of the creditors of the appointor in preference to the claims of the appointees, and the creditors may file a bill after the death of the appointor to subject the property to the satisfaction of the appointor's debts. *Knowles v. Dodge*, 66.

PRACTICE. See *Promissory Notes*, 4; *Contract*, 4; *Evidence*, 1, 3, 4, 11; *Indictment*; *Judgment*, 1; *Equity*, 2; *Jury*; *Ratification*.

1. The court in General Term will hear a motion for a new trial upon a bill of exceptions, notwithstanding no motion for a new trial had been made in the court below. *Lewis v. Shepherd*, 46.
2. It is the province of the jury, and not of the court, to estimate under the proof the damages in an action for rent. This is the uniform rule and practice, and if the court take the case from the jury as to the amount to be recovered, it will be error. *District of Columbia v. Johnson*, 51.
3. The reiterated decisions of the Supreme Court of the United States and of this court have sufficiently warned counsel of the consequences of neglecting divers requirements in the preparation of cases on appeal; this court, therefore, will not consider exceptions which would inevitably be held fatally defective in this respect on appeal to the Supreme Court of the United States. *Strong v. District of Columbia*, 265.
4. The presiding justice may certify a case to be heard in the General Term if he sees fit, against the remonstrance of all the parties, or he may refuse to make such certificate, though all the parties unite in asking it. It is a matter for his own discretion and there is no guide for action except his own sense of judicial propriety. *Insurance Co. v. Hosmer*, 297.
5. The provisions of rule 91 of this court apply only to appeals and cannot be extended to embrace a certified case. *Id.*
6. In a landlord's proceeding by attachment before a magistrate, the return of that officer to a writ of *certiorari* showed that a writ of execution upon a judgment *in personam* (unappealed from) had issued against such of the goods and chattels of the defendant as were *not exempt from execution*. Held, That the question of the exempt character of the property, not appearing to have been adjudicated by the magistrate, might be raised in an action of replevin against the constable for seizing the goods. *Wallingsford v. Bennett*, 303.
7. It seems that when a party has been compelled by the default of another (who was primarily liable) to pay damages for injuries received, he may recover in an action over, the entire amount paid, with interest and costs of both suits. *District of Columbia v. Railroad*, 314.
8. It is not error to refuse to instruct the jury upon a matter of law where no evidence tending to raise that question is introduced. *United States v. Guileau*, 498.
9. Nor is it error where no evidence is introduced tending to show an incapacity to act upon a knowledge that the act was wrong, for the court to instruct the jury that the affirmative tendency of the evidence in the case was to support a wholly different theory and ground of defense. *Id.*

10. The first day of a term of this court, but not its duration, is fixed; the term ends whenever the court adjourns *sine die*, and is then determined for all purposes. If, therefore, the day to which final execution of a sentence is postponed falls after the next term of this court as determined by its adjournment *sine die*, execution is postponed in accordance with the meaning of Section 845 of the Revised Statutes of the District of Columbia. *Id.*
11. If it should happen in any case that this court has prolonged the "next term" referred to in that section until the day set for final execution is reached, the criminal court would then be authorized upon application of the party, to postpone execution, so that it should fall after the actual adjournment *sine die* of this court. *Id.*

PRESUMPTION OF INNOCENCE. See *Evidence*, 7.

PRINCIPAL AND AGENT. See *Promissory Notes*, 3, 4; *Building Association*; *Married Women*, 3, 4, 5, 6.

PRINCIPAL AND SURETY. See *Guaranty*.

1. The engagement of a surety cannot be enlarged or varied without his consent; thus, defendants were sureties on an appeal bond, conditioned to pay intervening damages and costs. Afterwards the principal confessed judgment on the plaintiff agreeing to stay execution for thirty days; all this without the knowledge or consent of the sureties.

Held, That giving stay of execution on the judgment, without the consent of the sureties discharged them. *Kendall v. Grice*, 279.

2. On a certification to the General Term of a motion to quash a writ of certiorari in a landlord and tenant's proceeding, the court has no power to require the defendant to enter into an undertaking with surety to pay the intervening rent and damages occasioned by the delay in hearing the motion, and, as against the surety, between whom and the landlord there is no privity, such an undertaking is not supported by any consideration. Nor is the surety estopped to set up the want of consideration, the instrument not being under seal, and even if it were it is doubtful whether it would be good against him. *Insurance Co. v. Hosmer*, 297.
3. While it is perfectly well settled that a valid agreement between a creditor and the principal debtor, giving time after the maturity of the note, discharges the surety, yet the agreement must be a binding one; otherwise it is a mere voluntary indulgence and no valid defense for the surety. *May v. Shepherd*, 430.

PRIOR DECLARATIONS. See *Evidence*, 3.

PRIVIES IN CONTRACT. See *Consideration*, 5.

PRIVITY OF ESTATE. See *Adverse Possession*, 2.

PROMISSORY NOTES. See *Chattel Mortgages*, 2; *Judgment*; *Payment*.

1. Where the first of a series of three notes, payable in one, two and three years, and secured by deed of trust, had become overdue and was taken up, at the request of the maker, by a third party, who became the holder thereof, the payee delivering it uncanceled, the question whether such a transaction operated as a satisfaction and extinguishment of the note, so as to disentitle the holder to any share in the fund, when, afterwards, through default in payment of the other two notes, the property is sold for a sum less than the incumbrance, is one depending upon the intention of the parties at the time of the transaction; if there was no intention to consider it as satisfied and extinguished, the holder will be entitled to share *pro rata* in the fund realized. *Ramsey v. Daniels*, 16.

2. A case of this character stated in which the court held there was no extinguishment. *Id.*
3. An alteration by the endorsee or his agent increasing the rate of interest upon a promissory note if made without the knowledge or consent of the endorser and after it has passed out of his hands, is a serious and material change in the promise, and is sufficient to discharge him. *Lewis v. Shepherd*, 46.
4. A declaration in assumpsit consisted of a special count against the defendant as endorser of a promissory note, and also of the common money counts, having annexed thereto, as the only bill of particulars, the note sued on, the defendant being also the maker thereof. On the trial the note was shown to have been materially altered, as to the rate of interest, by the endorsee or his agent, after endorsement, and without the endorser's knowledge or consent.

Held. That by reason of the alteration of the note there could be no recovery upon the special count. Neither could there be a recovery upon any of the common counts for, in addition to the infirmity of an altered note as a bill of particulars, a liability as endorser does not imply a further liability by reason of the money that was advanced upon the note. *Id.*

PUBLIC POLICY. See *Exemptions*.

PUBLIC STATUTES, KNOWLEDGE OF.

The law imputes to parties full knowledge of the public statutes, and they are not to be heard to plead ignorance on the subject. *Strong v. District of Columbia*, 265.

RAILROADS. See *Damages*; *Inquisition*, 1, 3; *Municipalities*.

RATIFICATION. See *Assignment*, 1.

1. An act of ratification by a municipal body can only avail where there was original power and authority to perform the act to be ratified. If the act was void because *ultra vires*, and the municipality had no power to authorize it before it was undertaken and commenced, it has no power to adopt it after it is done. *Strong v. District of Columbia*, 265.
2. Hence where Congress had deprived the Board of Public Works of the power to make a contract without a previous appropriation by law, and had forbidden the legislative assembly of the District to authorize payment of any contract made without express authority of law, the assembly was powerless by any subsequent acts of attempted ratification and adoption to validate a contract void for want of such an antecedent appropriation. *Id.*
3. The power to waive all irregularities in the form and execution of the contracts resided with Congress alone. *Id.*
4. The provisions of the act of June 20, 1874, disclose on the part of Congress, speaking as the supreme legislature of the District, a full recognition of the existence of the seven classes of claims enumerated in the sixth section of that act, and a waiver of all formal objections to their allowance, the plain purpose of the statute being to assist those whose claims in one form or another were obnoxious to objection; among such claims being those for work done and materials furnished for street improvements upon contracts with the Board of Public Works, which were originally void for want of an antecedent appropriation. *Id.*
5. The fact that such a claim is presented for adjudication elsewhere than before the Board of Audit—the tribunal mentioned by the statute—does not revive and make effective the formalities cured by the act, as the waiver once established, remained in full force,

and for all time as against whatever
designed to hold as immaterial. *Id.*

statute

RECEIPT. See *Contract*, 8.

1. A receipt acknowledging the payment of money may be explained or contradicted by parol evidence.
2. The defendant relied upon the following receipt: "Received of Gilbert Vanderwerken, \$164.50, to balance in full for all account for hauling stone for use on the work of construction on the Baltimore & Potomac Railroad, for him and for the firm of Vanderwerken & Co.; and I do hereby release him and them from all obligations on account of the contract for such hauling. J. P. Connell. 26th July, 1872." Plaintiff offered to show by parol evidence that the receipt was not designed as an acquittance of the claim sued on, but that the same was expressly excepted by the parties at the time from its operation.

Held, admissible. *Connell v. Vanderwerken*, 242.

REASONABLE DOUBT. See *Evidence*, 7.

RECEIVER. See *Assignment*, 1; *Equity Pleading and Practice*, 5.

1. A receiver appointed to take possession of property, but required by the order appointing him to give bond before proceeding to act, cannot, until such bond is given, legally dispossess a party in possession. *Phillips v. Smoot*, 478.
2. If a party being rightfully in possession of real estate, sign a lease agreeing to pay rent to one whom he supposes to be a receiver with authority to take possession of the property, he is not estopped from afterwards showing the want of authority and title on the part of the lessor; such a case does not come within the rule that the tenant shall not deny the title of his landlord. *Id.*

RECORDING OF DEEDS. See *Bona Fide Purchaser*, 2.

The act of Congress of April 27, 1878, providing for the recording of deeds, mortgages, &c., repealed the antecedent laws limiting the time for the recording of certain deeds, so that a deed executed on the 9th of December, 1878, but not recorded until the 13th of May, 1879, can only be valid against creditors without notice from the latter date. *Bank v. Hitz*, 111.

REFEREE. See *Arbitration and Award*.

RELEASES. See *Assignment*, 1; *Contract*, 6.

RELIEF, PRAYER FOR. See *Equity Pleading and Practice*, 8.

REMANDING OF CASES. See *Arbitration and Award*, 1.

RENT. See *Landlord and Tenant*, 1, 2, 3; *Practice; Principal and Surety*, 2.

REPLEVIN. See *Practice*, 6.

1. Whether a demand is necessary in the case of a mere detention under claim of right before replevin can be maintained, *quære*. *Bridget v. Cornish*, 29.
2. Replevin against the officer will lie by the execution debtor when his exempt property has been levied on. *Walkingsford v. Bennett*, 303.
3. Defendant received from K., without fraudulent purpose towards plaintiff, or circumstances to put him on inquiry, certain goods as security for money loaned. Before suit brought (replevin) the defendant had returned the goods to K. without notice from plaintiff that the goods were his.

Held, That the plaintiff could not recover. *Carpenter v. Starr*, 417.

REPUTATION. See *Evidence*, 8.

RES JUDICATA. See *Practice*, 6.

RULES OF COURT. See *Arbitration and Award*, 1, 3; *Practice*, 5.

RULE OF DISTRIBUTION.

1. It is doubtful whether the rule heretofore frequently followed by this court of distributing the proceeds of an equity of redemption among judgment creditors in the order of their priority in obtaining their judgments, is the correct rule. *Hume v. Daly*, 460.
2. As to what is the rule that should be followed in such cases, *quære. Id.*

SALES. See *Fraud*.

SECRETARY OF STATE. See *Jurisdiction*.

SENTENCE. See *Counterfeiting*, 2; *Indictment*, 2; *Practice*, 10, 12.

Semble, That where the indictment is good but the term of imprisonment to which the prisoner has been sentenced exceeds the period fixed by the statute, the case may be remanded to the court below for the imposition of a shorter term. *United States v. Bickler*, 341.

SEPARATE ESTATE. See *Married Women*.

STATUTES OF FRAUDS. See *Chattel Mortgages*.

1. Where a deed is void in part, as an evasion of the statute of frauds, it is void in the whole; it cannot be held good for a part and void as to the remainder. *Smith v. Kenney*, 12.
2. The corporation of Washington, in December, 1867, passed an ordinance granting authority to defendants to construct a wharf at a point on the river front of the city in consideration of the payment of an annual rent of \$1000 for the term of ten years. The ordinance was to take effect on the execution by the grantees of a bond to fulfill the requirements of the ordinance. The grantees gave the bond and entered into possession. In 1878, the District of Columbia brought an action to recover the accrued rent. *Held*, That the grantees by entering into possession of the premises and accepting the terms of the ordinance made the latter the written memorandum of the contract, which was of itself sufficient to take the case out of the statute of frauds, although if necessary the court would find an additional memorandum in the execution of the bond under the requirements of the ordinance. *Held, also*, that the District of Columbia was the proper party to bring the action. *District of Columbia v. Johnson*, 51.

STATUTES OF MARYLAND.

The following, among others, referred to, commented on and explained:

1715, Chap. 23. See *Inquisition*, 2, *Limitation, Statutes of*, 5; *Street Railroads*, 5.

1785, Chap. —. See *Arbitration and Award*, 1.

1791, Chap. 45. See *Legislative Assent*.

STATUTES OF THE UNITED STATES.

The following, among others, referred to, commented on and explained:

1825, March 23. See *Taxation*, 2.

1867, February 5. See *Inquisition*, 1.

1868, July 4. See *Jurisdiction*, 1.

1869, April 10. See *Curtesy, Estate by the*, 2, *Husband and Wife*, 1, 3.

1871, February 21. See *Contract*, 2.

1872, May 21. See *Inquisition*, 1.

1874, June 20. See *Ratification*, 4.

1878, April 27. See *Recording of Deeds*.

1878, June 19. See *Certificate of Drawback*.

Revised Statutes, Section 1033. See *Trial*, 13.

do. do. do. 3224. See *Taxation*, 6.

do. do. do. 4898. See *Equity*, 1.

do. do. do. 5339. See *Murder*, 5.

do. do. do. 5457. See *Counterfeiting*, 1; *Crimes*.

do. do. do. 5458. See *Counterfeiting*, 2, *Crimes*.

do. do. D. C. Sections 678. See *Landlord and Tenant*, 2, 6.

do. do. do. do. 715. See *Interest*, 1.

do. do. do. do. 727. See *Husband and Wife*, 1, 3,

Married Women, 1, 8.

Revised Statutes, D. C., Section 797. See *Exemptions*.

do. do. do. do. 845. See *Practice*, 10.

STATUTES, CONSTRUCTION OF. See *Construction of Statutes*.

STAY OF EXECUTION. See *Principal and Surety*, 1.

STREET RAILROADS.

1. If the conduct of a passenger upon a street car is such that his expulsion appears to the conductor to be a just and proper expedient for the purpose of preventing a violation of decency and good order, the conductor will be justified in expelling him, the company being responsible for an abuse of this discretion or of any oppression in its exercise, and it will be error if the court so instruct the jury as to take away from them the consideration of the question whether the conduct of the passenger furnished a reasonable and probable cause for apprehending a breach of good order. *Lemont v. Railroad Co.*, 180.
2. A sick passenger on a street car must conform to the reasonable regulations of the car company; he has no prerogative to misbehave and to subject the other passengers to annoyance by his offensive conduct, and it will be no protection against his expulsion from the car that his misconduct is not willful or voluntary. The absence of an evil intention is a good defense to an indictment, but it cannot exonerate a person who is honestly supposed to be drunk and who repeatedly disobeys the request of the conductor to behave himself. *Id.*
3. The rule to be applied to steam cars in regard to accommodations to sick or decrepit persons is not a proper rule to be applied to horse railways. What might be permitted on the former, where the journeys are long and continuous, could not be practiced on the latter without great inconvenience to the company and the passengers. If the passenger is known by the conductor to be sick (and good faith requires that he be informed by the passenger of that fact in order that proper and reasonable allowance may be made for what may seem unusual or obnoxious in his conduct), and he is shown good treatment, the company will not be required to provide, without a special contract, any extra means for his accommodation. *Id.*
4. An instruction which implies that vomiting in a street car from intoxication is the only form of that evil which will authorize the conductor to expel the offending passenger, is erroneous, as it takes from the minds of the jury all other forms of the evil which, in the proper management of the car, might justify the conductor in ejecting the passenger. *Id.*
5. By the charter of certain street railway companies of Washington and Georgetown, the companies were required to keep their tracks

and the adjacent part of the streets, at all times, well paved and in good order, without expense to the United States and to the District, the District being also bound by statute to take all proper care of its streets and avenues. On the failure of the companies to perform this duty the work was done and paid for by the District, and to obtain reimbursement for the outlay, suit was afterwards brought by it against the companies.

Held, 1. That after the acceptance of their charters, the companies could not be heard to object that the provision was illegal or incapable of enforcement against them. 2. That the right of action grew out of and was founded upon the obligation in the charters as well of the District as of the companies, and that the suit was an action founded upon those statutes. 3. That the statutory obligation of the companies had been broken if the paving had caused any expense to the District, and this fact would furnish the consideration and foundation of the claim for reimbursement. 4. That the action was not within any of the enumerated actions mentioned in the 1st section of the Maryland act of 1715, chap. 23, to which the plea of limitation would be available. *District of Columbia v. Washington & G. R. R.*, 361.

6. One section of the charters of the companies required them to keep their tracks, &c., at all times, *well paved and in good order*; and by another section it was provided, "that nothing in this act shall prevent the government, at any time, from *altering the grades or otherwise improving all* avenues or streets occupied by said roads, or the respective cities from so altering or improving such streets or avenues, and the sewerage thereof, as may be under their respective authority and control; and in such event it shall be the duty of such company to change their said railroad so as to conform to such grade or pavement. The companies' charters also provided, "that the use and maintenance of said roads shall be subject to the municipal regulations of the cities of Washington and Georgetown."

Held, That the companies were bound by the charters not only to pave once the designated portions of the streets, but to repair the paving and to change the grade and lay new pavements within the prescribed limits whenever the municipality, in its discretion, should see proper to make changes in the streets, rendering such work proper to be done on the part of the companies. *Id.*

7. Where, on the failure of the companies to pave, &c., as required by their charters, the work is done by the District, assumpsit for the recovery of the sum expended is a more appropriate form of action than debt; and the declaration should charge that the sums paid were what the work was reasonably worth, the recovery being limited to such reasonable expenses incurred by the city as shall be ascertained by a jury. Extravagant amounts recklessly expended in the work without reference to its true value should not be allowed. *Id.*

STREETS. See *Limitations Statute of*, 6, 7.

1. A municipality charged with the duty and power to grade and alter the streets of its city is not answerable, in the performance of such work, for injury resulting to a citizen, unless negligence be shown. *District of Columbia v. Railroad Co.*, 314.
2. But it is otherwise with a private corporation, which is liable like any other private person making a specially authorized but extraordinary use of a public street. *Id.*
3. Such uses of public streets by private persons are lawful only because specially authorized, and while so conducted as to be harm-

less to others, but they become trespasses whenever injury occurs, whether resulting from negligence or not. *Id.*

4. Evidence, therefore, by such a defendant to show all possible care and diligence if unaccompanied by any assertion of responsibility on the part of another, or of want of care on the part of the person injured, should be excluded as immaterial to the issue. *Id.*
5. The fact that a municipality grants to a private person the right to engage in extraordinary work upon its streets does not deprive the municipality of the right to recover over against such person the amount which it (the municipality) has been compelled to pay to a citizen injured by reason of such work. *Id.*

SUPPLEMENTAL BILLS. See *Equity Pleading and Practice*, 4.

SWITZERLAND. See *Treaties*, 2.

TAXATION. See *Construction of Statutes*, 1; *Jurisdiction*, 3, 4; *Limitations, Statutes of*.

1. Whenever, on any fair construction of the legislation under which an exemption from taxation is claimed, there is a reasonable doubt whether the claim is made out, that doubt must be solved in favor of the Sovereignty. In other words, the language used must be of such a character as, when fairly interpreted, leaves no room for controversy. *R. R. and Bridge Co. v. District of Columbia*, 217.
2. The act incorporating the Chesapeake and Ohio Canal Company (assented to by Congress, March 3, 1825) declared its property forever exempt from taxation. By a provision of the act Congress had power to authorize the extension of the canal "into or through the District of Columbia * * * upon the same terms and conditions and with all the rights and privileges and powers of every kind whatsoever that the company incorporated by this act have to make the Chesapeake and Ohio Canal." Afterwards the Alexandria Canal Company was incorporated by Congress and authorized to construct a canal from the terminus of the Chesapeake and Ohio canal in Georgetown across the Potomac river. Under this charter a canal was conducted across the Potomac by an aqueduct, supported upon piers. In May, 1866, certain parties became lessees of the property. Subsequently, the lessees conveyed all their rights to complainants, a body politic.^o Later (July, 1868) the assent of Congress was given to the construction by complainants of a bridge over the aqueduct. The District of Columbia having assessed this bridge for taxation, complainants filed their bill to enjoin the enforcing of the tax on the ground that the exemption from taxation granted the Chesapeake and Ohio Company had been transmitted to complainants by their charter and the several acts of Congress;

Held, that the rights, privileges and powers communicated to the Alexandria Canal Company were those which the Chesapeake and Ohio Company had to make the canal, and that these might be exercised quite independently of any exemption from taxation, and could not be held to include any immunity therefrom.

Held, also, that even if the Alexandria Canal Company had been entitled to immunity from taxation, it could not be claimed by its lessees, as the exemption from taxation was a privilege of the company itself and does not pass to purchasers of its property and franchises.

Held, also, that where an act incorporating a company authorizes it to construct certain works and forever exempts its property from taxation, a subsequent act (unaccompanied by an exemption from

taxation) authorizing the company to construct other works, which are in no sense an appropriate part of the first or within the purposes or contemplation of those who granted the original franchise, the new property thus created cannot be fairly included as coming under the grant of exemption from taxation in the original act. *Id.*

3. A bridge firmly attached to and incorporated with the stone work of an aqueduct whose piers extend a great depth below the bottom of the Potomac river and are fastened to the solid rock cannot be considered as personalty or anything else than real estate within the meaning of the tax laws. *Id.*
4. Although an incorporated company has not for thirty years been charged with taxes upon its property, the court will nevertheless sustain the right to a tax, if it be a legal one, when the subject is finally brought to its attention. *Id.*
5. The mere cost of the planks of a bridge is not the only element to be taken into consideration in making an assessment; the use permitted to be made of the property under the franchise may enter as a constituent into the valuation. *Id.*
6. Section 3224 of the Revised Statutes of the United States declaring that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court," applies only to taxes levied by the United States, and has no application to taxes levied by the District of Columbia, although under authority of the United States. *Id.*
7. The rule that the mere illegality of a tax is no ground of itself for the interposition of a court of equity, but that there must exist in addition, special circumstances bringing the case under some recognized head of equity jurisdiction, applies only to taxes levied by the sovereign; it would seem not to be properly applicable to the case of an illegal tax levied by a municipal corporation. *Id.*

TERMS OF COURT. See *Practice*, 10, 12.

THREATS. See *Evidence*, 2, *Murder*, 2.

TRADE-MARKS.

1. The several acts of Congress regarding the registration of prints designed to be used as labels, do not exclude from registration a label containing matter which might be registered as a trade-mark, nor does the fact that a label, bearing such distinguishing marks as entitle it to registration as a trade-mark, exclude it from registration as a label if the owner desires it to be registered as such; whether the Commissioner of Patents is to regard it as the one or the other, depends wholly upon the will of its proprietor. *U. S., ex rel. Sewing Machine Co. v. Marble.*
2. The owner of a label entitled to registration under the law made application to the Commissioner of Patents for its registration, applicant had complied with all the requirements of the law, but the examiner in charge of that department of the Patent Office rejected the application on the ground that the label was not of the class entitled to registration, whereupon applicant, instead of appealing to the Commissioner of Patents, as he might have done, petitioned this court for a *mandamus* to compel the Commissioner to register the label, the Commissioner, in his answer to the rule to show cause, recited the facts of the failure of the applicant to appeal to the Commissioner from the examiner's decision, but at the same time approved of and endorsed the reasons of the examiner for refusing to register the label.

Held, That a peremptory *mandamus* to register the label should issue. *Id.*

TRESPASS. See *Municipalities*, 2.

TREATIES.

1. A treaty between the United States and a foreign power, if valid, is as much a part of the law of the land as the common law or statutes.
2. Under the treaty of 1850, between Switzerland and the United States, citizens of Switzerland may inherit of citizens of the United States in the same manner as any other citizens of this country. *Jost v. Jost*, 487.

TRESPASS. See *Municipalities*, 2.

TRIAL.

1. Under Section 1033 R. S. U. S., providing for the delivery to the defendant of a copy of the indictment and a list of the jurors and witnesses two entire days before the trial begins, the trial is to be considered as beginning when the jury is made up and sworn, and not when the prisoner is arraigned; and it would seem that Sunday may be included as one of the two days. *United States v. Neversen*, 152.
2. The pendency of a prior indictment to which a plea of not guilty has been entered, and upon which plea issue has been joined, is no bar to an arraignment and trial upon a second indictment in the same court for the same crime. *Id.*
3. A delivery to the defendant, after the trial begins, of a list containing the name of a witness who will be called in behalf of the prosecution, is not sufficient, under Section 1033 R. S. U. S., to entitle the prosecution to use such witness on the trial, even though the court should adjourn the trial for three days in order that the defendant may not be surprised. *Id.*
4. But when such evidence has been admitted the defendant, if he complains of it, must set out in the record what the evidence was; for, if it was immaterial or unfavorable to the prosecution, the ruling of the court below in permitting the witness to testify will be no ground for granting a new trial; and a mere statement in the record that the evidence, without setting it out, was "in behalf of the prosecution," is not sufficient to inform the court of the nature of the evidence. *Id.*

TRIAL BY JURY. See *Arbitration and Award*, 4.

TRUST.

1. Where a trust has been created for the benefit of a particular class of persons, as for example, "for the Calvinist Society," and there is nothing in the deed expressly declaring the particular nationality or location of the society to whom the advantages of the trust are to enure, the court will be governed by the circumstances surrounding the trust at its inception, and if there is sufficiently evinced an intention by the grantor to confine it to particular persons of a particular locality, the court will give effect to that intention and restrict the trust to those persons and to that locality most probably intended to be benefitted. *Ebbinghaus v. Killian*, 247.
2. After a lapse of nearly a hundred years, during which time the validity of a trust had never been questioned, and all parties ever claiming the property had claimed under the trustee's title, the court will, under proper circumstances of possession, presume the existence of grants and the enactment of statutes necessary to confirm the trustee's title. *Id.*
3. By the provisions of a deed of trust given to secure a promissory

note, the terms of sale in case of default were as follows: "*The amount of indebtedness* secured by said deed of trust unpaid, with the expense of the sale, in cash, and the balance at twelve and eighteen months."

Held, Not to be construed as depriving the trustees of the power to sell for less than the full amount of the debt, taxes and expenses. A provision in a deed of trust to secure a debt, to have that effect should be very clearly expressed. The true construction of this language is, that the trustees should require a cash payment of enough to satisfy the debt, if the purchase money be sufficient for that purpose, and the balance, if any, in two instalments. *May v. Shepherd*, 430.

4. S. gave his promissory note, bearing ten per cent. interest until paid, to M., and secured the same by deed of trust upon real estate; subsequently S., for a valuable consideration, conveyed the equity of redemption to W., and paid the interest on the note up to the date of the conveyance. W. then paid the interest until the maturity of the note, when he went to M. and told him that he (W.) had to pay the note, but asked for an extension of one year at the same rate of interest, which was granted. The agreement to extend was not in writing. A subsequent extension was obtained in the same manner. Default having finally been made, the property was sold, but did not sell for enough to satisfy the note. Whereupon S. was sued for the balance, and was held by the court liable for the same. *Id.*
5. The common law rule requiring the use of the word "heirs" in deeds of conveyance, in order to pass a fee, does not apply to deeds of trust; the latter are to be construed according to the intention, the trustee taking only such estate as is necessary for the execution of the trust. *Mackall v. Richards*, 444.
6. Where the trust is created solely for the benefit of the *cestui que trust*, he having the absolute control of the property, the power of disposition and the right of possession, the trustee cannot maintain the ejectment against him. *Id.*
7. Where the trustee has no right of possession save in behalf of the *cestui que trust*, and the latter conveys his entire interest to another pending an ejectment suit, brought in the name of the trustee in behalf of the *cestui que trust*, and includes in the conveyance his interest in the mesne profits claimed of the defendant in the pending suit, the trustee has no longer a right of action. *Id.*
8. The habendum clause of a trust deed was as follows: "To have and to hold the said lots, &c., unto the said party of the second part (the trustees), his heirs and assigns forever, for his and their sole use, benefit and behoof forever, in trust, nevertheless, for the use and purpose following, and none others, that is to say: to hold the same for the use and benefit of the aforesaid (*cestui que trust*), and subject to his absolute control and disposal, and to sell and dispose of the same as the said (*cestui que trust*) may in writing direct and require. *Id.*

Held, That the *cestui que trust* had the entire control and power of disposition over the property, including the right of possession, and having conveyed his entire interest pending an ejectment suit brought in his behalf in the name of the trustee, the defendant in the suit could set up the conveyance as a good defense against plaintiff, the trustee. *Id.*

ULTRA VIRES. See *Ratification*, 1.

UNINCORPORATED SOCIETIES. See *Equity*, 4.

UNITED STATES TREASURY. See *Jurisdiction*, 1.

VENDOR AND VENDEE. See *Bona Fide Purchaser*; *Damages*; *Fraud*; *Landlord and Tenant*; *Larceny*.

VERDICT. See *Bills of Exceptions*, 1, 2; *Evidence*, 12.

VOID PROMISE. See *Interest*.

WAIVER. See *Arbitration and Award*, 4; *Exemptions*; *Ratification*, 3.

WASHINGTON GASLIGHT COMPANY. See *Contract*, 5.

WHARF. See *Admiralty*, 3.

1. Distinction between public and private wharves on the river front of the city of Washington. *District of Columbia v. Johnson*, 51.
2. The corporation charter of the city of Washington gave the latter power to control and make disposition of public wharves, and to regulate and police private wharves.

WIFE. See *Husband and Wife*; *Dower*; *Evidence*, 15; *Married Women*, 3, 4, 5, 6.

WILL. See *Married Women*, 7; *Powers*.

1. Testator devised a house and lot to his daughter, E. F., "in trust for the benefit of her children," without particularizing them by their names. A like devise in trust was made to each of three other daughters. He then devised a house and lot to his daughters, E. F. and M. L., "in trust for the benefit of *their* children." The will then declared: "In the above devises and bequests that I have made I wish it to be understood that my desire is that the property so named and designated be held in trust by the persons so named as trustees until the youngest child in each family shall become of age, when it shall be conveyed to them as tenants in common." There was no evidence as to the value of the respective properties, nor as to how many children there were in each family, nor what advances had been made to them by the testator in his lifetime.

Held, That, in the absence of this evidence, by the assistance of which the court might have decided differently, and guided only by the face of the will to discover the intention of the testator, the devise to E. F. and M. L. must be construed as meaning that they were to take as trustees for two families or *groups* of children, and that each group took one-half of the devise. *Ferry v. Langley*, 140.

2. A will contained the following clause: "I bequeath and give to my dearly beloved brother, Henry Walker, forever, lot No. 6 in square 403, together with the improvements thereon erected and appurtenances thereto belonging." The testator did not own lot 6 in square 403; but the plaintiff, in an action of ejectment to recover lot 3 in square 406, offered to show by parol evidence, that this clause was intended as a devise of lot 3 in square 406. The evidence proposed to be given was: 1. That the testator intended to leave everything he owned to his brothers and sisters; 2. That he did not own lot 6 in square 403, but that he did own lot 3 in square 406, which was in the same general system of lots, all the four hundred series running down in the same straight line through that part of the city; 3. That the lot designated in the will had no improvements upon it, whereas lot 3 in square 406 was improved (the lot devised being described in the clause quoted as an improved lot.) He also offered to prove, as going to show the proper reading of the clause as understood by those directly interested, that since the will was admitted to probate, the widow who had a life estate in one-third of all the property,

had drawn but one-third of the rents, issues and profits of lot 3 in square 406, and that the guardian of Henry Walker had drawn the other two-thirds, and that all the beneficiaries of the will had acquiesced in this. *Held* inadmissible. *Patch v. White*, 468.

3. Where a particular estate is devised to one with remainder to the devisor's *heirs-at-law*, the remaindermen take the same estate which the law would have cast upon them if the devisor had died intestate as to the remainder. And in such case, for the purpose of ascertaining the heirs, the will is to be regarded as a nullity. *Jost v. Jost*, 487.

WITNESS. See *Accomplice*, 2-8; *Equity Pleading and Practice*, 1, 2, 7; *Evidence*, 3, 10; *Inquisition*, 6.

Ex. G. A. A.

15564^s 070

